Docket for 02-1824

No. 02-1824 Status: ARGUED
Title: Doug Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Petitioner
v.
Michael Wayne Haley
Docketed: June 18, 2003
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (01-41389)
Decision Date: September 27, 2002
Rehearing Denied: March 19, 2003

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jun 13 2003	Petition for writ of certiorari filed. (Response due July 18, 2003)
Jul 18 2003	Brief of respondent Michael Wayne Haley in opposition filed.
Jul 18 2003	Motion for leave to proceed in forma pauperis filed by respondent.
Jul 28 2003	Reply of petitioner Janie Cockrell, Director, Texas Department of Criminal Justice filed.
Jul 30 2003	DISTRIBUTED for Conference of September 29, 2003.
Oct 6 2003	DISTRIBUTED for Conference of October 10, 2003.
Oct 14 2003	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Oct 14 2003	Petition GRANTED.
Oct 23 2003	Motion to appoint counsel filed by respondent.
Oct 29 2003	Record received from the U.S.C.A for the 5th Circuit and the U.S.D.C. for the Eastern District of Texas. (1 envelope)
Nov 5 2003	Motion DISTRIBUTED for Conference of November 26, 2003.
Nov 19 2003	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including December 12, 2003.
Dec 1 2003	Motion to appoint counsel filed by respondent GRANTED. Eric M. Albritton, Esquire, of Longview, Texas is appointed to serve as counsel for the respondent in this case.
Dec 10 2003	SET FOR ARGUMENT Tuesday March 2, 2004.
Dec 12 2003	Brief amicus curiae of United States filed.
Dec 12 2003	Joint appendix filed.
Dec 12 2003	Brief of petitioner Doug Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division filed.
Dec 12 2003	Brief amici curiae of Illinois, et al. filed.
Dec 17 2003	CIRCULATED.
Dec 18 2003	Extension of time within which to file respondent's brief on the merits to and including January 26, 2004.
Jan 20 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 26 2004	Brief amici curiae of Zachary W. Carter, et al. filed. (Distributed)
Jan 26 2004	Brief amici curiae of Professors of Law, James S. Liebman, et al. filed. (Distributed)
Jan 26 2004	Brief of respondent Michael Wayne Haley filed. (Distributed)
Feb 23 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Feb 23 2004	Reply of petitioner Janie Cockrell, Director, Texas Department of Criminal Justice, Institutional Division filed. (Distributed)
Mar 2 2004	Argued. For petitioner: R. Ted Cruz, Solicitor General, Austin, Tex.; and on behalf of the United States, as amicus curiae, Matthew D. Roberts, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondent: Eric M. Albritton, Longview, Tex. (Appointed by this Court.)

Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Petitioner,

v.

MICHAEL WAYNE HALEY,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "actual innocence" exception to the procedural default rule concerning federal habeas corpus claims should apply to noncapital sentencing error.

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In the
Supreme Court of the United States

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Petitioner,

v.

MICHAEL WAYNE HALEY,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

This case presents the Court with a well-developed, three-way circuit split on the issue whether the "actual innocence" exception to the procedural bar rule applies in the noncapital sentencing context. The Seventh, Eighth, and Tenth Circuits have held that it does not; the Second has held that it does; and the Fourth and Fifth have held that it does in cases involving the application of habitual offender statutes. This question of national importance invokes concerns of comity, finality of state court convictions, and federalism. The Court should grant the petition for writ of certiorari to address this important question of federal law and resolve the circuit split. *See* SUP. CT. R. 10(a), (c).

CITATION OF OPINIONS

The Fifth Circuit's opinion is reported at 306 F.3d 257 (CA5 2002) (*Haley I*). App.. at 1a-20a. The opinion denying the Director's petition for rehearing en banc is reported at 325 F.3d 569 (CA5 2003) (*Haley II*). App.. at 21a-29a. The district court's final judgment is unreported. App., at 30a-38a.

BASIS FOR JURISDICTION

The Fifth Circuit delivered its judgment and opinion on September 27, 2002, and denied the Director's petition for rehearing en banc on March 19, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C.A. §1254(1).

STATUTORY PROVISIONS INVOLVED

Texas Penal Code §12.42 provides in relevant part:

(a)(2) If it is shown on the trial of a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of two felonies, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished for a second-degree felony.

Texas Penal Code §31.03 provides in relevant part:

(a) A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property.

. . .

(e) Except as provided by Subsection (f), an offense under this section is:

. . .

(4) a state jail felony if:

. . .

(D) the value of the property stolen is less than $1,500 and the defendant has been previously convicted two or more times of any grade of theft.

The Antiterrorism and Effective Death Penalty Act, 28 U.S.C.A. §2254 (AEDPA), provides in relevant part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On October 29, 1997, Haley was convicted of theft. *Haley I*, App., at 1a-2a. Haley's criminal act, theft of a calculator, would ordinarily have been punishable as a Class A misdemeanor, but it was enhanced to a "state jail felony" based on two prior theft convictions. *Id.*; TEX. PEN. CODE

§31.03(e)(4)(D). Additionally, based upon two other prior felony convictions for delivery of amphetamines and attempted robbery,[1] Haley was classified as a habitual felony offender, which resulted in the enhancement of his sentence to that of a second-degree felony. *Haley I*, App., at 2a; TEX. PEN. CODE §12.42(a)(2). Haley was sentenced to sixteen years imprisonment. *Haley I*, App., at 3a.

Under the Texas habitual felony offender statute, however, a defendant is not eligible for punishment enhancement merely because he has been convicted of any two prior felonies. As relevant to this case, the statute also requires that the convictions be "sequential"—that is, it requires the second previous felony conviction to be for an offense that was committed after the first previous felony conviction became final. TEX. PEN. CODE §12.42(a)(2). Accordingly, the indictment in this case alleged that Haley's first felony conviction for delivery of amphetamine had become final before the commission of his second felony of attempted robbery. *Haley I*, App., at 5a-6a, n.5. As the State has since conceded, however, this allegation was incorrect. *Id.*, at 5a. In actuality, Haley committed attempted robbery on October 12, 1991, six days before his felony conviction for delivery of

1. The panel opinion, the dissent from the petition for rehearing en banc, the district court, and the magistrate judge have identified this second felony conviction as being for "aggravated robbery." This incorrect characterization of Haley's conviction derives from Texas Department of Criminal Justice records that inaccurately reflected that charge. However, as demonstrated by the district court's nunc pro tunc judgment, Haley was convicted of attempted, not aggravated, robbery. This minor discrepancy is irrelevant to the question presented.

amphetamine became final on October 18, 1991. *Id.* Thus, there is no dispute that Haley's punishment was improperly enhanced under the statute.

Haley did not, however, object to the enhancement, at trial or on appeal. *Id.*, at 3a. On direct appeal, the state court of appeals affirmed Haley's conviction, and the Texas Court of Criminal Appeals refused Haley's petition for discretionary review. *Id.* In his state habeas petition, Haley alleged for the first time the specific complaint that his sentence had been improperly enhanced. *Id.*, at 4a. The state habeas court recommended that Haley's application be denied because this complaint, properly couched as a challenge to the sufficiency of the evidence, is not cognizable in a state post-conviction writ of habeas corpus, but can be brought only on direct appeal. *Id.*; *see also id.*, at App. 11a-12a (citing *Clark v. Texas*, 788 F.2d 309, 310 (CA5 1986)). Because Haley did not challenge the sufficiency of the evidence on direct appeal, his claim was procedurally barred. *Id.*, at App. 4a. The Texas Court of Criminal Appeals denied Haley's state habeas application based on the findings of the trial court. *Id.*

Haley timely filed his federal habeas application asserting, among other things, that there was no evidence to support the sequential nature of the enhancements as stated in the indictment. *Id.* The federal district court granted Haley's application on this ground, despite the state court's finding that it was procedurally barred. *Id.*, at App. 8a. The federal district court found that the procedural bar was excused because Haley had shown he was "actually innocent" with respect to sentencing because he lacked the timely predicate

violation for sentencing as a habitual offender under the Texas statute. *Id.*

The Fifth Circuit affirmed, holding that the "actual innocence" exception to the procedural bar doctrine applies to noncapital cases involving the application of habitual felony offender sentencing provisions. *Id.*, at App. 17a. The Director timely filed a petition for rehearing en banc. The petition was denied. However, Judge Smith, joined by Judges Jolly, Jones, Barksdale, Garza and Clement, dissented from the denial, pointing out the national importance of this issue and the well-developed circuit split. *See Haley II*, App., at 21a-29a.

SUMMARY OF THE ARGUMENT

The circuit courts are, and have been for some time, deeply divided on the question whether the "actual innocence" exception to the procedural bar rule applies in noncapital sentencing cases. The Fifth Circuit's application of the "actual innocence" exception in this noncapital sentencing case widens the already well-developed three-way circuit split.

In holding that the "actual innocence" exception applies in this case, the Fifth Circuit joined the Fourth Circuit (and to some extent the Second) on the side of the debate that extends the exception beyond the realm authorized by this Court—that is, beyond those cases concerning "actual innocence" of the underlying crime or "actual innocence" of the death penalty. On the opposite side of the debate are the Seventh, Eighth, and Tenth Circuits, which have correctly rejected the application of the "actual innocence" exception to noncapital sentencing cases.

The Second, Fourth, and Fifth Circuits's erroneous extension of the "actual innocence" exception beyond the narrow circumstances identified by this Court creates the potential for numerous collateral attacks to state court convictions. By painting with too wide a brush the category of cases that may be creatively described as involving "actual innocence," these circuits' holdings have the dangerous potential of opening the floodgates of habeas claims that allege improper sentencing under the guise of "actual innocence."

Moreover, these circuits' expansion of the "actual innocence" exception into the noncapital sentencing context undermines the procedural bar doctrine—a critical underpinning of federal habeas corpus law. The expansion disregards this Court's traditional adherence to and recognition of the principles of comity, finality, and federalism that likewise form a key basis of federal habeas corpus law.

As six judges noted in dissent from denial of rehearing en banc, "this case squarely presents a legal question of exceptional importance in an unusually pristine form." *Haley II*, App., at 23a. The Court should grant the petition to resolve the circuit split, halt the further degradation of the procedural bar rule, and clarify that the "actual innocence" exception to the procedural bar rule does not apply in the noncapital sentencing context.

ARGUMENT

I. THERE IS A SIGNIFICANT SPLIT IN THE COURTS OF APPEALS AS TO WHETHER THE "ACTUAL INNOCENCE" EXCEPTION TO THE PROCEDURAL BAR RULE APPLIES TO NONCAPITAL SENTENCING-PHASE ERROR.

There is a well-defined and growing split among the courts of appeals regarding the application of the "actual innocence" exception to the procedural bar rule in noncapital habeas corpus cases involving sentencing-phase error. Generally, a federal habeas petitioner may not raise a procedurally defaulted claim unless he demonstrates either (1) clear cause and prejudice for the default or (2) that a miscarriage of justice would result in not considering the claim. *Sawyer v. Whitley*, 505 U.S. 333, 339-40 (1992); *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). The miscarriage of justice exception is also called the "actual innocence" exception. *Sawyer*, 505 U.S., at 339. In ordinary usage, "actual innocence" is generally understood to mean that the petitioner did not actually commit the underlying crime. *Sawyer*, 505 U.S., at 340.

However, this Court has expanded the "actual innocence" exception to the capital sentencing context to include claims that the petitioner is "actually innocent" of the death penalty. *Id.*, at 339-40. At issue in this appeal is whether the Court's *Sawyer* opinion should be further extended to allow a noncapital habeas petitioner to present a procedurally defaulted claim that he is "actually innocent" of the sentence he received—as opposed to a claim that he is not guilty of the underlying crime.

As recognized by both the panel opinion below and the dissent from the denial of the petition for rehearing en banc, the courts of appeals have generated a three-way split on this issue that is clear, wide, and deep.[2] On one side of the split, the Seventh, Eighth, and Tenth Circuits have held that the "actual innocence" exception does not apply at all in noncapital sentencing cases. *See Hope v. United States*, 108 F.3d 119 (CA7 1997) (holding that the "actual innocence" sentencing exception did not survive the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA)); *Embrey v. Hershberger*, 131 F.3d 739 (CA8 1997) (en banc) (holding that the "actual innocence" exception applies only to sentencing in capital cases); *Reid v. Oklahoma*, 101 F.3d 628 (CA10 1996) (holding that the "actual innocence" exception does not apply in cases involving challenges to noncapital sentences); *United States v. Richards*, 5 F.3d 1369 (CA10 1993) (same). On the second side, the Second Circuit has held that the "actual innocence" exception extends to all noncapital sentences. *Spence v. Superintendent, Great Meadow Corr. Facility*, 219 F.3d 162 (CA2 2000). And on the third side of the split, reaching somewhat of a middle ground, the Fourth Circuit—and Fifth as a result of this case—have held that the "actual innocence" exception extends to noncapital sentences imposed under habitual offender statutes. *Haley I*, App., at 1a-

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2. The extent of the circuit split is demonstrated both by the fact that the circuits have split three, as opposed to merely two, ways on this issue and by the fact that there are three courts of appeals decisions on one side of the split (the Seventh, Eighth, and Tenth), one on the second side (the Second), and two on the third (the Fourth and Fifth).

20a; *United States v. Mikalajunas*, 186 F.3d 490 (CA4 1999); *United States v. Maybeck*, 23 F.3d 888 (CA4 1994).

As noted by the Third Circuit in *Cristin v. Brennan*, a noncapital case in which the court assumed, without deciding, that the "actual innocence" exception may apply to overcome a procedural bar, "the issue is not as simple as whether to apply *Sawyer* in a non-capital context; the courts of appeals have debated the types of sentences of which a petitioner can be innocent and whether a claim of innocence of the sentence is actually a disguised attack on the conviction's validity." 281 F.3d 404, 421-22 (CA3 2002). Reflecting the difficult nature of this issue, the courts of appeals have not only been at odds with each other, they have been internally inconsistent, and at various times, have placed themselves on opposite sides of the debate.

For example, the Seventh Circuit had previously held in *Mills v. Jordan*, 979 F.2d 1273 (CA7 1992), that the "actual innocence" exception applies in noncapital cases involving habitual offender sentencing statutes. In *Hope*, however, the court changed course and effectively overruled itself when it held that the "actual innocence" exception did not survive the 1996 amendments to the AEDPA. 108 F.3d, at 120.

Similarly, the Eighth Circuit had previously applied the "actual innocence" exception in a noncapital sentencing case where the defendant was sentenced under a statute that did not apply to him. *Jones v. Arkansas*, 929 F.2d 375, 380-81 (CA8 1991) (stating that "[i]t would be difficult to think of one who is more 'innocent' of a sentence than a defendant sentenced under a statute that *by its very terms* does not even apply to the defendant") (emphasis in original). The court also noted in a

footnote that "there are indications that the actual innocence exception also may apply to non-capital sentencing." *Id.*, at 381 n.16 (citing *Smith v. Murray*, 477 U.S. 527, 538 (1986)). *See also Pilchak v. Camper*, 935 F.2d 145, 148 (CA8 1991) (noting that the Eighth Circuit had "transported the exception into the sentencing phase of a trial"). Subsequent to this Court's opinion in *Sawyer*, however, the Eighth Circuit expressed doubt, in *Higgins v. Smith*, 991 F.2d 440, 441 (CA8 1993), that *Jones* was still good law, before eventually overruling itself, *en banc*, in *Embrey*.

And finally, the Tenth Circuit has changed its position twice since 1993. In *Richards*, a case involving an alleged misapplication of federal sentencing guidelines, the court stated that "a person cannot be actually innocent of a noncapital sentence." 5 F.3d, at 1371. One year later, in *Selsor v. Kaiser*, 22 F.3d 1029, 1036 (CA10 1994), the court suggested that the "actual innocence" exception might apply where a petitioner shows factual innocence of a sentencing element that was not required for proof of an underlying conviction. Coming full circle in *Reid*, another case involving a defendant claiming to be innocent of an enhancement charge, the Tenth Circuit, without mentioning its contrary statement in *Selsor*, held once again that "a person cannot be actually innocent of a noncapital sentence." 101 F.3d, at 630 (citing *Richards*, 5 F.3d, at 1371).

The Fifth Circuit's opinion is the latest in a long line of cases from the courts of appeals grappling with the question of whether the "actual innocence" exception to the procedural bar rule applies to noncapital sentencing. The courts of appeals have generated a stark three-way split that shows no signs of

resolving itself. In recent years, the Court has denied certiorari three times on this issue.[3] The issue has percolated long enough. Because of its importance to the finality of state convictions, the Court should grant the petition and address the issue in this case that is ripe for review.[4]

II. THE APPLICATION OF THE "ACTUAL INNOCENCE" EXCEPTION IN NONCAPITAL SENTENCING CASES RAISES A QUESTION OF NATIONAL IMPORTANCE.

A. The "Actual Innocence" Exception Should Remain a Narrow Exception to the Procedural Bar Rule.

One of the founding principles of federal habeas review is the abiding concern for the "finality of state judgments of conviction and the significant costs of federal habeas review." *Sawyer*, 505 U.S., at 338 (citations omitted). With this principle in mind, the Court has long held that, ordinarily, a federal habeas court may not review procedurally barred claims. *Id.*

The "actual innocence" exception is a narrow exception to the procedural bar rule that has been described by the Court as

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3. *United States v. Mikalajunas*, 186 F.3d 490 (CA4 1999), *cert. denied*, 529 U.S. 1010 (2000); *Embrey v. Hershberger*, 131 F.3d 739 (CA8 1997) (en banc), *cert. denied*, 525 U.S. 828 (1998); *Reid v. Oklahoma*, 101 F.3d 628 (CA10 1996), *cert. denied*, 520 U.S. 1217 (1997).

4. The fact that the mandate has issued in this case does not cause a mootness problem. *See Mancusi v. Stubbs*, 408 U.S. 204, 205-07 & n.1 (1972); *Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 306-08 (1946).

the "extraordinary case" when a habeas petitioner shows cause and prejudice or "actual innocence." *Sawyer*, 505 U.S., at 339 n.6 (citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986)); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (holding that a habeas petitioner may obtain review of a procedurally defaulted claim only on a showing of cause and prejudice). As originally conceived, the exception contemplated strictly factual innocence—that is, the case where the State has convicted the wrong person of the crime, and not "legal innocence"—meaning mere legal insufficiency. *Sawyer*, 505 U.S., at 339-40. Thus, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray*, 477 U.S., at 496.

In *Sawyer*, the Court took the next step, extending the "actual innocence" exception beyond its original construction and into the arena of capital sentencing, so that a habeas petitioner who has committed the crime may nonetheless be able to show that he is "actually innocent" of the death penalty if he can show by "clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty." *Id.*, at 340-41, 348. But, the Court did not, in *Sawyer* or since, extend the "actual innocence" exception beyond the death penalty sentencing context.

Nonetheless, the Second, Fourth, and Fifth Circuits have themselves extended the exception to include claims of sentencing error in the noncapital context. But, if the "actual innocence" exception extends to noncapital cases—whether

only those involving the incorrect application of habitual offender statutes or to all noncapital sentences—these kinds of claims will cease to be "extremely rare." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). A legal claim that a substantive criminal statute has been wrongly applied to specific facts can, by resort to a rather unsophisticated play on words, always be converted into a complaint that the relevant facts did not support the sentence and that therefore the defendant was "actually innocent" of his particular sentence. *See Embrey*, 131 F.3d, at 741.

For example, under the logic of the Second, Fourth, and Fifth Circuits, a habeas petitioner could always raise a procedurally defaulted claim that there was insufficient evidence to support a finding that the underlying crime was aggravated, thus resulting in an improper and, according to the petitioner, illegal sentence. In such a case, the petitioner would simply argue that he was "actually innocent" of the imposed sentence because he was "actually innocent" of having committed an aggravated crime.

But if the "actual innocence" exception is to be applied in that manner, then any claim challenging the legal sufficiency of the evidence can be said to be one of "actual innocence," effectively unraveling the barrier to post-conviction relief that the limited exception of "actual innocence" was meant to maintain. *Id.* The "actual innocence" exception would cease to be a narrow "gateway" through which a habeas petitioner must pass, and would become instead a readily available means to upset state convictions, on grounds never adjudicated in state court. That interpretation of the "actual innocence" exception is untenable, for it could result in a deluge of habeas

claims alleging "actual innocence" of sentencing in countless criminal cases.

B. The Fifth Circuit's Expansion of the "Actual Innocence" Exception to the Noncapital Sentencing Context Conflates the Exception with the Alleged Underlying Constitutional Violation.

The Court's habeas jurisprudence "makes clear that a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera v. Collins*, 506 U.S. 390, 404 (1993). In other words, a free-standing claim of "actual innocence" will not alone support a claim for habeas relief. *Id.*, at 404-05. Instead, the habeas petitioner must "supplement[] his constitutional claim with a colorable showing of factual innocence." *Id.*, at 404.

By extending the "actual innocence" exception to noncapital cases involving habitual offender statutes, the panel opinion, in effect, allows a free-standing "actual innocence" claim to serve—by itself—as the basis for habeas relief, in direct contradiction to *Herrera*. This is because Haley's claim that he is "actually innocent" of habitual offender status is identical to his underlying and procedurally barred claim that the evidence was insufficient to support his sentencing under the habitual offender statute. Haley claims to be "actually innocent" because he is "actually innocent."[5]

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5. Of course, Haley is not "actually innocent" of being an habitual offender. Factually speaking, he has been convicted of several crimes, five of which are implicated in this case. Instead, he is only "legally

Indeed, the panel opinion demonstrates the error of its own logic. The panel did not—because it could not—first determine that Haley had demonstrated "actual innocence" of his sentence before proceeding to review the underlying procedurally barred claim. Instead, the panel's analysis of Haley's claim of "actual innocence" and his underlying constitutional claim of insufficient evidence collapse into one inquiry of whether the habitual offender statute was correctly applied to Haley. The "actual innocence" exception was never intended to be applied in this circular manner.

The Second, Fourth, and Fifth Circuit's expansion of the "actual innocence" exception to noncapital sentencing ignores the Court's admonitions that the exception should be a "narrow" one. And, it misreads the Court's "actual innocence" jurisprudence by allowing a free-standing claim of "actual innocence" to serve as the constitutional claim supporting habeas relief. If this line of cases is not reversed, the gateway will be open to numerous—and heretofore unsupportable—claims of "actual innocence" being used to excuse procedurally defaulted claims.

III. PRINCIPLES OF COMITY, FINALITY, AND FEDERALISM DICTATE THAT A FEDERAL COURT SHOULD RESPECT A STATE COURT'S FINDING OF A PROCEDURAL BAR.

The touchstone of federal habeas law is the "historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts." *Williams*

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innocent" of habitual offender status in Texas because two of his convictions were not sequential: the second conviction occurred six days before his first became final. *See* TEX. PEN. CODE §12.42(a)(2).

v. Taylor, 529 U.S. 420, 436 (2000). In keeping this delicate balance, the Court has "been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings." *Id.*; *see also Coleman*, 501 U.S. 722, 726 (noting that federal courts owe the States and the States' procedural rules deference when reviewing the claims of state prisoners in federal habeas corpus).

The procedural default doctrine is a critical underpinning of federal habeas law. It is "designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time." *McCleskey v. Zant*, 499 U.S. 467, 493 (1991). Moreover, the doctrine seeks "to vindicate the State's interest in the finality of its criminal judgments." *Id.* Thus, proper respect of a State court's finding of a procedural bar is crucial to the federal habeas framework and is mandated by our federalism.

Because application of the"actual innocence" exception to the procedural bar rule undermines principles of federalism, it should be narrowly construed. Indeed, this Court has repeatedly emphasized the narrow scope of the exception. *See, e.g., Sawyer*, 505 U.S., at 340-41; *McCleskey*, 499 U.S., at 502; *Dugger v. Adams*, 489 U.S. 401, 412 n.6 (1989); *Murray*, 477 U.S., at 496. And, until *Sawyer*, the Court found no reason, even in capital cases, to extend the exception beyond the conventional definition that strictly involves "actual innocence" of the crime.

However, as noted by the dissent from the denial of rehearing en banc, language from this Court's "actual

innocence" cases "can be read to point in opposite directions." *Haley II*, App., at 25a. Specifically, the Second, Fourth, and Fifth Circuits find support for their position that the "actual innocence" exception may apply to noncapital sentencing in the Court's suggestion in *Smith* that the availability of the "actual innocence" exception depends not on the "nature of the penalty" the State imposes, but on whether the constitutional error "undermined the accuracy of the guilt or sentencing determination." 477 U.S., at 537-38. These circuits construe that language—taken out of context—to mean that the Court did not intend to prohibit the application of the "actual innocence" exception in noncapital cases. *Haley I*, App., at 13a-14a; *Spence*, 219 F.3d, at 170-71; *Maybeck*, 23 F.3d, at 893 & n.9.

But, when viewed in conjunction with the Court's complete jurisprudence in this area, the better argument is the reverse. While extending the "actual innocence" exception to the capital sentencing context in *Sawyer*, the Court was careful to draw a clear distinction between the concept of "actual innocence" in the context of noncapital versus capital sentencing cases. The Court stated that "[t]he present case requires us to further amplify the meaning of 'actual innocence' in the setting of capital punishment." *Id.*, at 340. Noting that the "prototypical example of 'actual innocence' in a colloquial sense is the case where the State has convicted the wrong person of the crime," the Court stated that "[i]n the context of a noncapital case, the concept of 'actual innocence' is easy to grasp." *Id.*, at 341. The most logical implication of this statement is that Court intended to expand—or amplify—the "actual innocence" exception to sentencing only

in the unusual circumstance of capital cases. *See Embrey*, 131 F.3d, at 740-41; *Richards*, 5 F.3d, at 1371.

The Court should expand the "actual innocence" exception no further. Empowering federal habeas courts to look past a procedural bar under the "actual innocence" exception sanctions the non-compliance with state procedural rules. It encourages "'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." *Wainwright*, 433 U.S., at 89. Ultimately, the federal court's ability to disregard state procedural rules undermines the state trial process and "detract[s] from the perception of the trial of a criminal case in state court as a decisive and portentous event." *Id.*, at 90. Thus, principles of comity, finality, and federalism demand that the federal court's power to review procedurally defaulted claims under the guise of "actual innocence" be limited in scope and narrowly conceived.

The Fifth Circuit—following the lead of the Fourth, and to a lesser extent, the Second—erroneously extended the "actual innocence" exception to cases involving noncapital sentencing phase error in the application of habitual offender statutes. The Court should grant the petition to clarify that the "actual innocence" exception does not apply outside the narrow confines already identified by the Court, and in particular, does not apply to overcome a procedural bar in a noncapital sentencing case.

IV. THIS CASE IS AN IDEAL VEHICLE FOR THE COURT TO CONSIDER THE APPLICATION OF THE "ACTUAL INNOCENCE" EXCEPTION TO NONCAPITAL SENTENCING.

Because there is no disagreement as to the underlying facts in this case, it presents an excellent vehicle for the Court to resolve an important and widening circuit split. Indeed, as the dissent from the denial of the Director's petition for rehearing en banc noted, "[t]his purely legal question is unsullied by factual disputes . . . Thus, this case squarely presents a legal question of exceptional importance in an unusually pristine form." *Haley II*, App., at 23a. The Court should take this opportunity to resolve the circuit split on this important issue of law.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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June 13, 2003

APPENDIX

**United States Court of Appeals,
Fifth Circuit.**

**Michael Wayne HALEY, Petitioner-Appellee,
v.
Janie COCKRELL, Director, Texas Department of
Criminal Justice, Institutional
Division, Respondent-Appellant.**

No. 01-41389.

Sept. 27, 2002.

Before DeMOSS, STEWART and DENNIS, Circuit Judges.

CARL E. STEWART, Circuit Judge:

The respondent appeals from the district court's grant of habeas corpus in favor of the defendant, Michael Wayne Haley ("Haley"). Finding no error, we affirm. The only issue before us is whether the district court properly granted habeas relief to Haley for his insufficiency-of-the-evidence claim. Thus, we recite only those facts pertinent to our decision.

FACTUAL AND PROCEDURAL BACKGROUND

Haley, an inmate of the Texas Department of Criminal Justice, Institutional Division, proceeding *pro se,* filed a federal application for writ of habeas corpus pursuant to 28 U.S.C. § 2254, asserting that his conviction was illegal.

On October 29, 1997, Haley was convicted of a "state jail felony," which is a felony in the second degree, and was sentenced as a habitual felony offender. *See* Tex Penal Code

Ann. §§ 12.35 and 12.42. Antecedent to the conviction, Haley was indicted for theft, a Class A misdemeanor, which was enhanced to a "state jail felony" by his two prior theft convictions. [FN1] In addition, the indictment alleged two prior felony convictions for delivery of amphetamines and aggravated robbery. [FN2] Together, these two prior convictions enhanced his "state jail felony" to a second degree felony. Because the indictment alleged two prior felony convictions, Haley was classified as an habitual felony offender resulting in an enhanced sentence at the punishment phase of his trial.

> FN1. Under Texas law, an offense is classified as a "state jail felony" if the defendant has been previously convicted of two or more thefts. TEX. PENAL CODE ANN. § 31.03(e)(4)(D).
>
> FN2. A defendant commits aggravated robbery if he "uses or exhibits a deadly weapon" during the commission of the offense. TEX. PENAL CODE ANN. § 29.03(a)(2).

During the punishment phase of Haley's trial, the State presented one witness who testified that Haley had been previously convicted of delivery of amphetamines and aggravated robbery. Haley did not cross-examine the State's witness or put on any evidence. After the parties rested, the jury was excused while the trial court prepared the jury instructions. Shortly after the jury was excused, the trial judge realized that the enhancement paragraphs provided in the indictment, concerning Haley's two prior convictions for delivery of a controlled substance and aggravated robbery, had not been read to the jury. Before bringing the jury back into

the courtroom, the trial judge asked Haley if he wanted to enter a plea to the enhancements before the jury. Haley chose not to enter a plea and requested that the trial court not inform the jury that he was given such an opportunity. The next day, the trial court reopened the punishment proceedings to allow the State to read the enhancements to the jury. No mention was made of Haley's decision not to enter a plea, and the State did not reoffer its witness's testimony. Haley did not object to the reading of the enhancement or to the State's failure to reoffer the evidence. The jury found the enhancements alleged in the indictment to be true, and Haley was sentenced to a term of sixteen years and six months imprisonment.

Haley appealed his conviction, arguing, *inter alia*, that the trial court erred in failing to ask him to plead to the enhancement paragraphs of the indictment at the beginning of the punishment phase of his trial and that the trial court erred, during the punishment phase, in allowing the State to reopen its case for the purpose of reading the enhancement paragraphs to the jury. The Texas appellate court affirmed Haley's conviction. The court concluded that any error due to the trial court's failure in not requiring the State to reintroduce Haley's prior convictions, or in allowing the jury to consider his prior convictions before the reading of the enhancements, was waived by Haley's failure to object on those grounds. Further, it found that "any error by the trial court in failing to elicit a plea from Haley to the enhancements after the enhancements were read to the jury [was] waived under the invited error doctrine." [FN3] Thereafter, the Texas Court of Criminal Appeals refused Haley's petition for discretionary review.

FN3. The invited error doctrine precludes a defendant from "complaining on appeal of alleged errors which he invited or induced, especially where the defendant may not have been prejudiced by the error." *United States v. Green*, 272 F.3d 748, 754 (5th Cir.2001).

In February 2000, Haley filed a state habeas application in the trial court raising several challenges to the enhancement of his punishment. The court determined that his application raised the following grounds of error: (1) the theft offense was not properly enhanced in accordance with the Texas Penal Code, (2) the evidence was insufficient to support the enhancements for the prior felony offenses of delivery of amphetamines and aggravated robbery, and (3) ineffective assistance of counsel. The state habeas trial court recommended that the application be denied concluding that (1) the theft offense was enhanced correctly, (2) the sufficiency of the evidence had been raised on direct appeal and thus could not be attacked by a writ of habeas corpus, and (3) Haley's trial counsel was not ineffective. The Texas Court of Criminal Appeals denied Haley's state habeas application based upon the findings of the trial court.

Haley timely filed a § 2254 application in the United States District Court for the Eastern District of Texas in which he alleged the following points of error: (1) there was no evidence to support the chronological order of the enhancements as stated in the indictment, [FN4] (2) there was no evidence presented to support the State's claim that he had previously been convicted of aggravated robbery, (3) the State made an improper jury argument, and (4) he received ineffective assistance of counsel.

FN4. Under the Texas habitual offender statute, "[i]f it is shown on the trial of a state jail felony ... that the defendant has previously been finally convicted of two felonies, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished for a second-degree felony." TEX. PENAL CODE ANN. art. 12.42(a)(2) (Vernon 1995).

With regard to the first alleged error, Haley argued that the aggravated robbery in Cause No. 7-91-1086 was committed on October 12, 1991, and the conviction for delivery of amphetamines in Cause No. 1-89-671 did not become final until October 18, 1991. [FN5] Thus, he contended that the indictment incorrectly stated that the delivery of amphetamines conviction became final "prior to the commission of each of the offenses set out above," and the jury could not have found the enhancement paragraphs factually accurate. In its response to Haley's application, the State conceded that the chronological order of the convictions alleged in the enhancement paragraphs was erroneous.

FN5. With regard to Haley's two prior convictions, the indictment provided in germane part:

[P]rior to the commission of the primary offense by the said MICHAEL WAYNE HALEY ... on the 9th day of September, 1992 ... in Cause Number 7-91-1086, the said MICHAEL WAYNE HALEY was convicted of the felony offense of Aggravated Robbery and said conviction became final prior to the commission of the primary offense.

> [P]rior to the commission of the primary offense by the said MICHAEL WAYNE HALEY ... on the 18th day of October, 1991 ... in Cause Number 1-89-671, the said MICHAEL WAYNE HALEY was convicted of the felony offense of Delivery of Amphetamine and said conviction became final prior to the commission of each of the offenses set out above.

In response to Haley's second allegation, the State argued that Haley's sentence was properly enhanced because he had a prior felony conviction, aggravated robbery, which included an affirmative finding of a deadly weapon. [FN6] However, Haley countered that he was sentenced for attempted robbery which did not contain a finding of a deadly weapon, indicating that this finding was removed by a *nunc pro tunc* judgment. [FN7] The State later conceded that Haley's attempted robbery conviction did not include an affirmative finding of a deadly weapon.

> FN6. Texas law provides that a defendant convicted of a state jail felony will be punished for a third degree felony if it is proven that the defendant had previously been finally convicted of aggravated robbery. TEX. PENAL CODE ANN. art. 12.35(c)(2)(A) (Vernon 1995).

> FN7. After Haley filed his habeas petition and the State filed its response, Haley filed a motion to supplement the state court record with the *nunc pro tunc* judgment. Upon a grant of Haley's motion, the Magistrate judge ordered the State to respond to Haley's contention that he was not convicted of a felony carrying an affirmative finding that a deadly weapon

> was used. The state received a copy of Haley's motion and the *nunc pro tunc* judgment. In its response, the State acknowledged the *nunc pro tunc* judgment and conceded that Haley was not convicted of a felony involving the use of a deadly weapon but argued that Haley is still not entitled to habeas relief because his claim is procedurally barred.

Nonetheless, the State argued that even though there was no finding of a deadly weapon in his robbery conviction, Haley was not entitled to habeas relief because his claim was procedurally barred from federal habeas review. The State emphasized that the state appellate court specifically noted that Haley failed to preserve any issue regarding the enhancement for review on appeal because he had failed to raise them in a timely objection or motion. The State noted that, on habeas review the state trial court concluded that his sufficiency claims could not be raised for the first time in a habeas application, and that the Texas Court of Criminal Appeals denied his state habeas application on the findings of the trial court. The State therefore reasoned that any issue relating to the enhancement that Haley may now be raising would be procedurally barred by his failure to present any contemporaneous objections. [FN8] Alternatively, the State argued that the doctrine of invited error barred Haley from obtaining federal relief, "given his voluntary silence and inaction during trial."

> FN8. Under the Texas contemporaneous objection rule, a petitioner is deemed to have waived any error by failing to raise an objection. *Corwin v. Johnson*, 150 F.3d 467, 472-73 (5th Cir.1998). This Court has held

that the contemporaneous objection rule constitutes an adequate and independent state ground procedurally barring federal habeas review. *Sharp v. Johnson,* 107 F.3d 282, 285-86 (5th Cir.1997).

Upon order of the district court, a magistrate judge issued a report, recommending that Haley's federal habeas application be granted on his claim regarding the improper enhancement of his sentence. [FN9] The judge was not persuaded that Haley's claim was procedurally barred because the state appellate court's decision addressed only those claims raised by Haley on direct appeal. Because Haley had not argued that the robbery charge did not include a finding of a deadly weapon, the magistrate judge found that the state appellate court had not expressly applied the procedural bar to this argument. [FN10] Notwithstanding the procedural bar, the magistrate judge determined that Haley's procedural default was excused because Haley had shown that he was "actually innocent" of a predicate violation required for sentencing as a career offender for a second degree felony. The judge concluded that failure to address this claim would result in a "fundamental miscarriage of justice."

FN9. The magistrate judge did not address Haley's ineffective assistance of counsel claim relating to the sentencing enhancement in light of her recommendation to grant relief. However, the magistrate judge denied Haley's contention that the prosecutor's remarks deprived him of a fair trial as well as Haley's remaining ineffectiveness claims.

FN10. The magistrate judge's report continuously focused on the lack of a finding of a deadly weapon

with respect to Haley's robbery conviction. The State did not rely on the finding of a deadly weapon to support the enhancement during sentencing, however, and Haley's § 2254 application did not raise this issue. The issue of a deadly weapon came up only in the State's response to Haley's § 2254 application when the State offered this argument as an alternative reason to support the enhancement.

After a *de novo* review, the district court adopted the magistrate judge's report and granted Haley's § 2254 application as to the claim that his sentence was improperly enhanced denying him relief on his other claims. Accordingly, the district court ordered the Texas courts to re-sentence Haley without the improper enhancement within ninety days and that should the State fail to do so, his conviction shall be reversed. This Court subsequently granted the State's motion to stay the district court's order of re- sentencing during the appeal of this case. This appeal follows.

STANDARD OF REVIEW

[1] When reviewing a grant of habeas corpus relief, this court reviews the district court's factual findings for clear error and its disposition of pure legal issues and mixed issues of law and fact *de novo. Valdez v. Cockrell,* 274 F.3d 941, 946 (5th Cir.2001). "If a state-court decision rejecting a federal habeas petitioner's constitutional claim rests on an adequate and independent state procedural bar, [a federal habeas court] may not review the merits of the federal claim absent a showing of cause and prejudice for the procedural default, or a showing that failure to review the claim would result in a complete

miscarriage of justice." *Muhleisen v. Ieyoub,* 168 F.3d 840, 843 (5th Cir.1999).

[2] The Antiterrorism and Effective Death Penalty Act ("AEDPA") provides for deference in reviewing claims in a state prisoner's habeas corpus application that were *adjudicated on the merits* in state-court proceedings. 28 U.S.C. § 2254(d). A federal court must defer to a state court's resolution of both pure questions of law and mixed questions of law and fact unless the state court's determination was "contrary to" or an "unreasonable application" of clearly established federal law as determined by the Supreme Court. § 2254(d)(1). A § 2254 applicant may also receive habeas corpus relief regarding a claim adjudicated on the merits in state court if the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." §2254(d)(2). The deferential standards set forth by AEDPA, however, do not apply where the state court denied the petitioner's claim on procedural grounds. *See Valdez v. Cockrell,* 274 F.3d at 946-48 ("Section 2254(d)'s deference operates when the state court has adjudicated the petitioner's claim on the merits.... An 'adjudication on the merits' occurs when the state court resolves the case on substantive grounds, rather than procedural grounds."); *see also Fisher v. Texas,* 169 F.3d 295, 300 (5th Cir.1999) (concluding that when a state habeas court decides a habeas applicant's claim on procedural grounds, there has not been an "adjudication on the merits"). Because the state habeas court dismissed this claim on procedural grounds, the deferential standards under § 2254(d) do not apply.

DISCUSSION

[3][4][5] Under the procedural-default doctrine, federal courts are precluded from granting habeas relief where the last state court to consider the claims raised by the petitioner expressly and unambiguously based its denial of relief on an independent and adequate state-law procedural ground. *Coleman v. Thompson,* 501 U.S. 722, 729-30, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Hughes v. Johnson,* 191 F.3d 607, 614 (5th Cir.1999). When a state court explicitly relies on a procedural bar, a state prisoner may not obtain federal habeas relief absent a showing of cause for the default and actual prejudice. *Coleman,* 501 U.S. at 750, 111 S.Ct. 2546; *Wainwright v. Sykes,* 433 U.S. 72, 84-85, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). A petitioner who fails to satisfy the cause-and-prejudice standard may nonetheless be entitled to habeas relief if he can show that the imposition of the procedural bar would constitute a miscarriage of justice-i.e., that the petitioner is *actually innocent* of the crime. *Sawyer v. Whitley,* 505 U.S. 333, 339-40, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992); *Finley v. Johnson,* 243 F.3d 215, 220 (5th Cir.2001). "In order to be actually innocent of a non-capital sentence, the petitioner must show that 'but for the constitutional error he would not have been legally eligible for the sentence he received.'" *Sones v. Hargett,* 61 F.3d 410, 418 (5th Cir.1995) (citing *Smith v. Collins,* 977 F.2d 951, 959 (5th Cir.1992)).

I. Procedural Default

[6][7][8] The State asserts that Haley's insufficiency-of-the-evidence claims are procedurally barred because he failed to raise any objection to the enhancement at trial. A state

prisoner is generally required to exhaust all available state remedies before applying for federal relief. *See Nobles v. Johnson,* 127 F.3d 409, 419-20 (5th Cir.1997). Under Texas law, sufficiency of the evidence may be raised on direct appeal, but is not cognizable on collateral review. *See Clark v. State of Tex.,* 788 F.2d 309, 310 (5th Cir.1986). Thus, in order to exhaust his claims, Haley was required to raise them in a petition for discretionary review. *See Richardson v. Procunier,* 762 F.2d 429, 429 (5th Cir.1985). He did not. Haley is procedurally barred from raising his insufficiency-of-the-evidence claims in state court because his time to file a petition for discretionary review has expired. *See* Tex.R.App. P. 68.2.

[9] Because Haley has failed to exhaust his insufficiency-of-the-evidence claims, federal review is barred unless he can show cause and actual prejudice from the procedural default, or that failure to review the claim would result in a complete miscarriage of justice due to his "actual innocence." *See Muhleisen,* 168 F.3d at 843. Haley has not alleged cause or actual prejudice. Thus, we must determine whether Haley's claim can be reviewed under the actual-innocence exception to the procedural bar. An actual innocence claim is "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Dowthitt v. Johnson,* 230 F.3d 733, 741 (5th Cir.2000) (quoting *Herrera v. Collins,* 506 U.S. at 404, 113 S.Ct. 853). Haley has made such a claim.

II. Actual Innocence Exception

[10] The State argues that the district court erred in applying the actual- innocence exception to the instant case because it

involves a noncapital offense. This court has twice assumed, without holding that the "actual innocence" exception is available in a noncapital sentencing context. *See Sones v. Hargett,* 61 F.3d 410, 413 (5th Cir.1995); *Smith v. Collins,* 977 F.2d 951, 959 (5th Cir.1992). Until this case, we have left open the issue of whether the exception applies to sentencing in noncapital cases. We now hold that the actual innocence exception applies to noncapital sentencing procedures involving a career or habitual felony offender.

The magistrate judge recognized that the extension of the actual innocence standard to noncapital cases was *dicta* in *Smith* and *Sones.* Nevertheless, the magistrate judge applied the standard and concluded that it is clear from the record that Haley was "actually innocent" of the predicate felony conviction necessary to enhance his conviction from a state jail felony to a second-degree felony. By extension, the magistrate judge concluded that because Haley is "actually innocent" of having two prior felony convictions, Haley's sentence was improperly enhanced as a habitual felony offender. The district court adopted the magistrate judge's finding and granted habeas relief as to the claim that Haley's sentence was improperly enhanced. We agree with the district court that, based on the unquestionable improper enhancement of Haley's sentence, he has shown that, but for the constitutional error, he would not have been legally eligible for the sentence he received.

[11][12] The State argues that this issue has not been addressed by the Supreme Court. Although the Court has not expressly extended the actual innocence exception to noncapital offenses, it considered whether a petitioner was

actually innocent of the aggravating factors necessary for a capital sentence. *See Sawyer v. Whitley*, 505 U.S. 333, 345, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). The Court did not foreclose the application of the actual innocence exception to noncapital sentencing cases. More importantly, the Court has noted that the purpose of the rule "is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera v. Collins*, 506 U.S. 390, 404, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) (citation omitted). With this fundamental purpose in mind, we agree with the Fourth Circuit which has held that the actual innocence exception applies to non capital cases only in the context of a habitual offender finding during the punishment phase of the trial.

The State further notes that other Circuit Courts are split on the issue of whether, in the sentencing context, the actual innocence exception applies to capital cases only or also to noncapital cases. *Compare Spence v. Superintendent, Great Meadow Correctional Facility*, 219 F.3d 162, 171 (2nd Cir.2000) (holding that the actual innocence exception applies to noncapital sentencing when a predicate act for enhancement is at issue) *with Embrey v. Hershberger*, 131 F.3d 739, 740 (8th Cir.1997) (en banc) (holding that the actual innocence exception applies "to the sentencing phase of death cases") *cert. denied*, 525 U.S. 828, 119 S.Ct. 78, 142 L.Ed.2d 61 (1998).

The Eighth, Seventh, and Tenth Circuits have held that in the sentencing context, the actual innocence exception applies only to sentencing in capital cases. *See Embrey*, 131 F.3d at 740; *Hope v. United States*, 108 F.3d 119, 120 (7th Cir.1997)

(determining that the actual innocence exception to noncapital sentencing proceedings did not survive the enactment of the AEDPA); *Reid v. Oklahoma*, 101 F.3d 628, 630 (10th Cir.1996) (holding that the actual-innocence exception does not apply in cases involving challenges to noncapital sentences). In contrast, the Fourth and Second Circuits have applied the actual innocence exception to sentencing in noncapital cases. *See Spence*, 219 F.3d at 171, *United States v. Mikalajunas*, 186 F.3d 490, 494-95 (4th Cir.1999) (limiting *Maybeck* to the "context of eligibility for application of a career offender or other habitual offender guideline provision.") *cert. denied*, 529 U.S. 1010, 120 S.Ct. 1283, 146 L.Ed.2d 230 (2000); *United States v. Maybeck*, 23 F.3d 888, 893-94 (4th Cir.1994) (holding that actual innocence of a noncapital sentence applies to eligibility for sentencing as a career or habitual offender). [FN11]

> -FN11. The Third Circuit, like this Circuit has "assumed *arguendo*" that the actual innocence exception applies to noncapital sentencing. *See Cristin v. Brennan*, 281 F.3d 404, 422 (3rd Cir.2002) (noting that some courts have applied the actual innocence exception to noncapital sentencing cases in the context of factual findings of prior convictions on which the noncapital sentence is based).

The Second Circuit extended the actual innocence exception to noncapital sentencing proceedings. *See Spence*, 219 F.3d at 171. The court reasoned that the "[Supreme] Court has made clear that the availability of [the] actual innocence exception depends not on the 'nature of the penalty,' the state imposes, but on whether the constitutional error 'undermined the

accuracy of the guilt or sentencing determination.'" *Id.* (quoting *Smith v. Murray*, 477 U.S. 527, 537-38, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986)). Thus, finding no reason to limit the exception to capital cases, the *Spence* court broadly applied the actual innocence exception to the sentencing phase of noncapital cases "[b]ecause the harshness of the sentence does not affect the habeas analysis and the ultimate issue, the justice of the incarceration, is the same." *Id.*

The Fourth Circuit initially extended the actual innocence standard to noncapital cases reasoning that application of the actual innocence exception to the aggravating factors of a capital sentencing case is functionally equivalent to applying the exception to aggravating factors enhancing a noncapital sentence under the guidelines. *See Maybeck*, 23 F.3d at 893. Thus, applying the actual innocence exception in either case meets the "objective of protecting defendants from sentencing based on elements of crimes for which they are conclusively innocent." *Id.* at 894. However, the Fourth Circuit narrowed the exception to noncapital cases "only in the context of eligibility for application of a career offender or other habitual offender guideline provision." *Mikalajunas*, 186 F.3d at 495. The court reasoned that to broaden the exception further would "swallow" the "cause portion of the cause and prejudice requirement" and it "would conflict squarely with Supreme Court authority indicating that generally more than prejudice must exist to excuse a procedural default." *Id.* at 494-95. We find the approach of the Fourth Circuit persuasive.

The State argues on appeal, that *Sones* is not binding on this Court because it expressly declined to hold that the actual-innocence exception applied to noncapital sentencing.

Although in *Smith* and *Sones*, we have assumed that the actual innocence standard extends to non-capital sentencing, in both of those cases, we ultimately concluded that the petitioner in question was not "actually innocent." *See Smith*, 977 F.2d at 959; *Sones*, 61 F.3d at 419- 21. In this case, we conclude that although Haley is procedurally barred from raising his insufficiency-of-the-evidence claim, the actual innocence exception to the procedural bar applies. Having concluded that the actual innocence exception applies to this case, we must now consider the merits of Haley's insufficiency-of-the-evidence claims. This Court has held that the granting of habeas relief is appropriate where the State has failed to produce sufficient evidence of the petitioner's habitual offender status. *See French v. Estelle*, 692 F.2d 1021, 1024-25 (5th Cir.1982).

III. Insufficiency Of The Evidence

[13] The State argues that Haley is inappropriately raising an insufficiency-of-the-evidence claim in a state writ of habeas corpus petition. Haley counters that he is not raising an insufficiency-of-the-evidence claim. Instead he asserts that there is *no* evidence that he was convicted of a felony involving the use of a deadly weapon, to support the enhancement. The State's argument that these claims are insufficiency-of-the-evidence claims is supported by federal and state law. In *Jackson v. Virginia*, the Supreme Court found that the standard for habeas review of the sufficiency of the evidence to support a state conviction is whether any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found the essential elements of the crime beyond a reasonable doubt. 443 U.S.

307, 317-18, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). This Court has applied the *Jackson* standard to habeas claims where the defendant asserted that there was *no evidence* to support the enhancement convictions. *See French v. Estelle*, 692 F.2d at 1024-25. (applying the *Jackson* standard of review to a federal habeas claim that the Government produced *no evidence* showing the date upon which a second offense occurred for purposes of enhancement); *see also Ex Parte Williams*, 703 S.W.2d 674, 679-81 (Tex.Crim.App.1986) (holding that a claim that the State presented no evidence of when a second prior felony was committed did not constitute a *no evidence* claim, but rather a collateral attack on the sufficiency of the evidence).

In *United States v. Maybeck*, the Fourth Circuit applied the actual innocence exception to a procedural default where the defendant's non-capital sentence was improperly enhanced on the basis of his miscalculated career offender status. 23 F.3d at 893-94. Maybeck pled guilty to bank robbery and the unlawful possession of a firearm. During the punishment phase of his trial, the defendant mischaracterized a prior conviction as involving violence. *Id.* That conviction along with a second prior conviction constituted the two predicate felonies necessary to qualify Maybeck as a career offender, a status used to enhance his sentence. *Id.* at 890-91. The Fourth Circuit determined that Maybeck was actually innocent of the predicate offense that qualified him as a career offender, and therefore, it was a miscarriage of justice to enhance his sentence under the career offender provision of the guidelines. *Id.* at 894.

Haley's circumstance is fundamentally equivalent to the circumstances addressed in *Maybeck*. During the punishment phase of his trial, Haley's prior conviction for aggravated robbery was mischaracterized as one involving a deadly weapon. That mischaracterization and his second predicate felony, delivery of methamphetamine, qualified Haley as a habitual felony offender under the Texas sentencing guidelines. In fact, the State has conceded that Haley was not convicted of aggravated robbery involving a deadly weapon. We conclude that a rational trier of fact could not have found beyond a reasonable doubt that Haley has been convicted of two felonies, an essential element of the habitual felony offender provision of the Texas sentencing guidelines because Haley is actually innocent of being convicted for aggravated robbery.

In the present case, this finding of "actual innocence" only entitles Haley to a correction of the improper enhancement of his sentence for his state jail felony conviction. In order to be sentenced as a habitual felony offender, the Texas Penal Code requires that Haley must have been previously convicted of *two felonies* and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final. The State conceded, and the district court found, that the chronological order of the convictions alleged in the enhancement paragraphs was erroneous and, more significantly for the purposes of this appeal, that Haley was not convicted of aggravated robbery involving a deadly weapon. Haley was not convicted of two felonies. Thus, the requirements of the Texas habitual felony offender statute have not been satisfied resulting in Haley's actual innocence of his status as an habitual felony offender,

and consequently, the improper enhancement of his sentencing for his state jail felony.

If we were to condemn Haley to suffer the consequences of an affirmative finding which, by virtue of the *nunc pro tunc* judgment, never existed, he would continue serving a sentence as an habitual offender of which he is in fact innocent. This is a classic example of a "fundamental miscarriage of justice," precisely what the actual innocence exception was created to prevent. We therefore affirm the district court's grant of habeas relief and vacate the stay of the district court's order entered by this court.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's ruling, VACATE the stay entered by this Court, and REMAND to the United States District Court for the Eastern District of Texas for further proceedings in accordance with this opinion.

AFFIRMED.

United States Court of Appeals,

Fifth Circuit.

Michael Wayne HALEY, Petitioner-Appellee,

v.

Janie COCKRELL, Director, Texas Department of Criminal Justice, Institutional

Division, Respondent-Appellant.

No. 01-41389.

March 19, 2003.

ON PETITION FOR REHEARING EN BANC

(Opinion Sept. 27, 2002, 5th Cir., 306 F.3d 257)

Before DeMOSS, STEWART and DENNIS, Circuit Judges.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The court having been polled at the request of one of the members of the court, and a majority of the judges who are in regular active service not having voted in favor (Fed. R.App. P. 35 and 5th Cir. R. 35), the petition for rehearing en banc is DENIED.

JERRY E. SMITH, Circuit Judge, with whom JOLLY, JONES, BARKSDALE, EMILIO M. GARZA and CLEMENT, Circuit Judges, join, dissenting from the denial of rehearing en banc:

This exceptionally important case deserves the attention of the en banc court. For the first time, we extend the "actual innocence" exception for procedurally defaulted habeas corpus claims to non-capital sentences. The federal courts of appeals are split three ways on this question, and the panel opinion aligns this court with one of the two positions adopted by only one other circuit. Before this decision is set in stone as binding circuit precedent, the issue should receive review and thorough consideration by the entire court.

I.

In general, a habeas petitioner may not raise a procedurally defaulted claim, i.e., a claim not presented to the state court, unless he demonstrates cause for the default and prejudice from the alleged constitutional violation. *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). A petitioner may, however, obtain a hearing on a procedurally defaulted claim if he demonstrates his actual innocence of the underlying offense, even if he cannot satisfy the general cause-and-prejudice test. *Murray v. Carrier,* 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). "Actual innocence" in that context means the petitioner did not commit the crime.

The Supreme Court has extended the actual innocence exception for the cause- and-prejudice test to the context of capital sentencing, meaning a petitioner who has committed the crime may, nonetheless, be "actually innocent" of the penalty of death. *Sawyer v. Whitley,* 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). Neither the Supreme Court nor this court, however, has extended the exception to non-capital sentences. [FN1]

This case presents a perfect opportunity for the full court to consider whether to extend the exception to non-capital sentences where the petitioner is not actually innocent of the crime. This purely legal question is unsullied by factual disputes: Texas concedes that Haley was not eligible under Texas law for the sentence he received, because the indictment wrongly alleged that Haley's prior drug conviction was final before he committed his prior robbery, a chronological order necessary to Haley's sentence enhancement. [FN2]

It bears repeating that Texas concedes this error and argues only that the actual innocence exception should not extend to non-capital sentences. Thus, this case squarely presents a legal question of exceptional importance in an unusually pristine form.

II.

A.

In various procedural settings, three circuits have held that the actual innocence exception does not extend to any non-capital sentences. [FN3] In a 28 U.S.C. § 2255 case, the Eighth Circuit held that the actual innocence exception does not apply to non-capital sentences. *Embrey v. Hershberger,* 131 F.3d 739 (8th Cir.1997) (en banc). The court carefully reviewed Supreme Court precedent, in particular *Sawyer,* and concluded that "*Sawyer,* in terms, applies only to the sentencing phase of death cases." *Embrey,* 131 F.3d at 740.

The Eighth Circuit also relied on the Tenth Circuit's decision in *United States v. Richards,* 5 F.3d 1369, 1371 (10th Cir.1993), which refused to extend the exception. In *Richards,* the court upheld the government's objection to a second § 2255

motion, based on the abuse of writ doctrine. *Id.* at 1370. The petitioner had argued that he should be allowed to file a second motion based on a showing of actual innocence of his non-capital sentence. *Id.* at 1371. The Tenth Circuit rejected this argument out of hand: "A person cannot be actually innocent of a noncapital sentence[.]" *Id.* The Tenth Circuit has reaffirmed this holding, in a 28 U.S.C. § 2254 case, after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Reid v. Oklahoma,* 101 F.3d 628, 630 (10th Cir.1996).

Similarly, if more dramatically, the Seventh Circuit has held that the exception does not survive AEDPA. *Hope v. United States,* 108 F.3d 119 (7th Cir.1997). The prisoner sought permission to file a second § 2255 motion based solely on an improper sentencing enhancement. *Id.* at 120. The court reasoned that AEDPA allows second petitions only if no reasonable factfinder would have convicted the prisoner of the "offense." *Id.* Thus, the Seventh Circuit, concluding that AEDPA eliminated the exception, overruled its caselaw extending the exception to non-capital sentences. *Id.* (citing *Mills v. Jordan,* 979 F.2d 1273, 1278 (7th Cir.1992)).

On the second side of the three-way split, the Second Circuit alone has held that the actual innocence exception extends to all non-capital sentences. *Spence v. Superintendent, Great Meadow Corr. Facility,* 219 F.3d 162 (2d Cir.2000). In *Spence,* the prisoner's probation was rescinded and replaced with a sentence of up to twenty-five years' imprisonment for which he was not legally eligible. *Id.* at 165. The Second Circuit, however, did not equivocate or rest on the severity of the wrongly-imposed sentence. The court held that the actual

innocence exception applies across the board "to the sentencing phase of a noncapital trial." *Id.* at 171.

Alone on the third side of the split--alone, that is, until joined by the panel in the instant case--the Fourth Circuit has held that the actual innocence exception extends only to those non-capital sentences imposed under habitual offender statutes. Like the Second Circuit, the Fourth Circuit originally had held that the actual innocence exception extends to all non- capital sentences. *United States v. Maybeck,* 23 F.3d 888, 893 (4th Cir.1994).

Five years later, the Fourth Circuit, perhaps recognizing that this holding was untenable, limited the scope of *Maybeck. United States v. Mikalajunas,* 186 F.3d 490 (4th Cir.1999). Citing the frightening practical results of *Maybeck* and its tension with Supreme Court caselaw, the court held that the actual innocence exception "applies in noncapital sentencing only in the context of eligibility for application of a career offender or other habitual offender guideline provision." *Id.* at 495. This holding provoked a vigorous dissent arguing that the distinction was unprincipled and unsustainable. *Id.* at 497-502 (Murnaghan, J., dissenting). This court's panel has chosen to adopt the reasoning used in *Mikalajunas.*

B.

Unfortunately, the Supreme Court has not addressed this question. Indeed, the limited implications of its caselaw can be read to point in opposite directions. Given the exceptional importance of the question and the lack of guidance from above, the full court should have reheard this case.

The panel finds support in *Sawyer* and *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). The panel observes that "[t]he Court did not foreclose [in *Sawyer*] the application of the actual innocence exception to noncapital sentencing cases." *Haley*, 306 F.3d at 265. This is correct, but *Sawyer* did not present the question. Moreover, some language in *Sawyer* indicates that the Court did not intend the lower courts to extend the actual innocence exception to non-capital sentencing cases.

The Court "acknowledged that actual innocence 'does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense.'" *Sawyer*, 505 U.S. at 340 (quoting *Smith v. Murray*, 477 U.S. 527, 537, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986)). The Court then observed that "[a] prototypical example of 'actual innocence' in a colloquial sense is the case where the State has convicted the wrong person of the crime." *Id.* This example indicates why, "[i]n the context of a *noncapital* case, the concept of 'actual innocence' *is easy to grasp.*" *Id.* at 341, 112 S.Ct. 2514 (emphases added). Finally, the Court described its task in *Sawyer* as "striv[ing] to construct an analog to the *simpler situation* represented by the case of a noncapital defendant." *Id.* (emphasis added).

The Tenth and Eighth Circuits inferred from this reasoning that the Supreme Court never intended the lower courts to extend the actual innocence exception to non-capital sentencing cases. Otherwise, why is the concept of actual innocence so "easy to grasp" in the non-capital context? And why is a non- capital case a "simpler situation"? In the Tenth Circuit's view, it is "because it simply means the person didn't

commit the crime." *Richards*, 5 F.3d at 1371. The Eighth Circuit concluded that "the most natural inference to draw from these observations on the Court's part is that" the actual innocence exception should not extend to non-capital sentencing. *Embrey*, 131 F.3d at 741.

At the same time, other language in *Sawyer* suggests the Court's openness to applying the actual innocence exception to non-capital sentences. For example, the Court stated that "[i]n *Smith*, [it] found no miscarriage of justice in the failure to examine the merits of procedurally defaulted claims *in the capital sentencing context.*" *Sawyer*, 505 U.S. at 339, 112 S.Ct. 2514 (emphasis added) (citation omitted). The Court also stated that "[t]he present case requires us to further amplify the meaning of 'actual innocence' *in the setting of capital punishment.*" *Id.* at 340, 112 S.Ct. 2514 (emphasis added).

The meanings of these passages are debatable. One might argue, though, that the Court would not have added the qualifying phrases "in the capital sentencing context" or "in the setting of capital punishment" if it intended to extend the exception only to capital sentences.

But "[m]ore importantly," according to the panel, "the Court has noted that the purpose of the [actual innocence] rule 'is grounded in the equitable discretion of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons.'" *Haley*, 306 F.3d at 265 (quoting *Herrera*, 506 U.S. at 404, 113 S.Ct. 853). *Herrera*, however, is not especially helpful to the question before this court.

In *Herrera*, the petitioner claimed to be innocent of the murder of which he was convicted. Haley, on the other hand, is not innocent, nor does he claim to be; he is a recidivist offender duly convicted after a full and fair trial and whose conviction the state courts repeatedly upheld on appeal and collateral review. Further, the Supreme Court denied relief in *Herrera*. Even if we were to conclude that the actual innocence exception extends to non-capital sentences, therefore, *Herrera* would not support the extension.

In light of the limited guidance from the Supreme Court, and ambiguity in what guidance there is, the en banc court should have reheard this case to determine whether and, if so, how the actual innocence exception applies to non-capital sentences. Accordingly, I respectfully dissent from the denial of rehearing en banc.

FN1. We have assumed twice, without deciding, that the exception extends to non-capital sentences. *See Sones v. Hargett*, 61 F.3d 410, 413 (5th Cir.1995); *Smith v. Collins*, 977 F.2d 951, 959 (5th Cir.1992).

FN2. The panel suggests a second error in the indictment, namely, an erroneous allegation that Haley's prior robbery offense involved a deadly weapon. *Haley v. Cockrell*, 306 F.3d 257, 261 & n. 7, 262, 263 & n. 10, 264, 267 (5th Cir.2002). In his response to the petition for rehearing en banc, Haley concedes that any such error is irrelevant, because his enhancement rested solely on the chronological order of his convictions.

FN3. *See Haley*, 306 F.3d at 265 (collecting cases).

Neither the cause-and-prejudice test nor the actual innocence exception to that test varies based on the posture of the case. Indeed, *Sawyer*, which first applied the actual innocence exception to capital sentences, was a successive-writ case, not an ordinary procedural-default case.

[Final Judgment filed October 29, 2001]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

MICHAEL WAYNE HALEY §

v. § CIVIL ACTION NO.

6:00CV518

DIRECTOR, TDCJ-ID §

FINAL JUDGMENT

The above-styled application for the writ of habeas corpus having come before the Court for consideration, and a decision having been duly rendered, it is hereby

ORDERED and ADJUDGED that relief is granted to the Petitioner as to his claim that his sentence was improperly enhanced. The above-styled application for the writ of habeas corpus is hereby GRANTED as to this claim, and the State of Texas shall have ninety (90) days in which to re-sentence Haley without the improper enhancement of his sentence. Should the State fail to do so, his conviction shall be reversed. It is further

ORDERED and ADJUDGED that no relief is granted to Haley on the remaining claims in his petition.

SIGNED this 27th day of October, 2001.

/s/ T. John Ward

T. JOHN WARD

UNITED STATES DISTRICT JUDGE

[Final Judgment filed October 29, 2001]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

MICHAEL WAYNE HALEY §

v. § CIVIL ACTION NO.

6:00CV518

DIRECTOR, TDCJ-ID §

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND ENTERING FINAL JUDGMENT

The Petitioner Michael Wayne Haley, proceeding *pro se*, file this application for the writ of habeas corpus under 28 U.S.C. §2254 complaining of the validity of his conviction. This Court ordered that the matter be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Haley was convicted of misdemeanor theft on October 29, 1997. His sentence was enhanced to a second-degree felony by two prior convictions, for aggravated robbery and delivery of a controlled substance. The indictment charged him with having committed aggravated robbery, which offense became final prior to the commission of the theft, and with

having committed delivery of amphetamines, which offense became final prior to the commission of the robbery and of the theft. However, Haley pointed out, and the Respondent conceded, that the indictment was in fact incorrect; the conviction for delivery of amphetamines did not become final until after the commission of the aggravated robbery.

Nonetheless, the Respondent argued that Haley's sentence was properly enhanced because the robbery conviction carried a finding that a deadly weapon was used in the commission of the offense. According to the Respondent, Section 12.35 of the Texas Penal Code provides that a person convicted of a state jail felony shall be punished for a third degree felony if it is shown that the person had previously been finally convicted of any felony for which the judgment contains an affirmative finding of a deadly weapon. Additionally, the Respondent says, Haley had been previously convicted of the felony offense of delivery of a controlled substance, raising the level of punishment to that of a second-degree felony under Tex. Penal Code section 12.33. Haley received a sentence of 16 years and 6 months, falling within the range of a second-degree felony; thus, the Respondent concludes that the punishment was properly enhanced.

Haley responded to this argument by pointing out that the finding of the deadly weapon in the robbery conviction had been removed by a *nunc pro tunc* judgment. The Respondent, in reply to this assertion, conceded that the finding of the deadly weapon had been removed, but contended that Haley's claim had been procedurally defaulted because he did not raise any objections to the enhancement provisions at sentencing.

On September 14, 2001, the Magistrate Judge entered a Report recommending that relief be granted to Haley on this point. The Magistrate Judge set out the relevant state sentencing statutes, Sections 12.35 and 12.42, Tex. Penal Code, and observed that Haley's argument that he should properly have been sentenced under Section 12.35(a), not 12.35(c), had "substantial force."

In addressing the Respondent's procedural default contention, the Magistrate Judge observed that whether Haley's claim was defaulted at all was not clear, because the decision of the Court of Appeals' discussion focused on the events of the trial at sentencing rather than the improper enhancement provisions. The Magistrate Judge noted that Haley could hardly have been expected to complain at sentencing about the deadly weapon finding in the aggravated robbery conviction because the State was not relying on this finding for enhancement, but instead on the two prior convictions; indeed, the deadly weapon finding in the prior robbery conviction does not even appear in the indictment for the theft case.

The Magistrate Judge further concluded that even if a procedural bar existed, its application would amount to a fundamental miscarriage of justice because it would render Haley subject to a sentence for a second-degree felony when there exists no basis in the law for such a sentence. The Magistrate Judge stated that this would "condemn Haley to suffer the consequences of an affirmative finding which, by virtue of the *nunc pro tunc* judgment, never existed." Thus, the Magistrate Judge recommended that relief be granted on this claim and that the State be given 90 days in which to re-

sentence Haley without the improper enhancement of his sentence, and that his conviction be reversed if the State failed to do so. The Magistrate Judge also recommended that Haley's remaining grounds of error in his petition be denied.

The Respondent filed objections to the Magistrate Judge's Report on October 18, 2001. The Respondent argues first that Haley procedurally defaulted his claim by failing to make any objections to the enhancement paragraphs at sentencing. The Respondent brushes aside the fact that the last reasoned opinion from the state court made no mention of a failure to object to the propriety of the enhancement paragraphs *per se*, saying that the "contemporaneous objection rule" is an adequate and independent state law ground for denying relief.

The Respondent next argues that Haley's claim is procedurally defaulted because the precise claim which he raised is that the evidence is insufficient to support chronological order of the enhancements and that no evidence was presented to support the state's claim that he had previously been convicted or robbery. However, the Respondent says, sufficiency of the evidence is no cognizable in state habeas corpus, but only on direct appeal; thus, because Haley only raised his claim on this point through the state habeas corpus proceedings, it is procedurally defaulted in federal court. This contention is without merit because a fair reading of Haley's petition shows that his challenge is to the propriety of the enhancement provisions, not the sufficiency of the evidence *per se*.

The Magistrate Judge also concluded that, even if the claim was procedurally defaulted, this default was excused because it would constitute a fundamental miscarriage of justice. The Respondent correctly notes, as did the Magistrate Judge, that the Fifth Circuit's holding that the actual innocence standard applies to non-capital sentencing procedures was made in dicta. Sones v. Hargett, 61 F.3d 410, 419 and n. 16 (5th Cir. 1995). However, the Respondent then simply states that Haley "has never shown cause for failing to challenge the enhancement," without addressing the injustice inherent in sentencing Haley for a second-degree felony when such sentence is not legally available.

Finally, the Respondent argues that Haley "invited error" in the proceedings by declining to enter a plea to the enhancement proceedings during trial. The Respondent notes that the Court of Appeals found that Haley had invited error, but fails to mention the error which he invited was that he was not given an opportunity to plead to the enhancement paragraphs in the presence of the jury. Clearly Haley did not "invite the error" of being sentenced based on a deadly weapon finding which did not exist. This contention is without merit.

The Court has conducted a careful *de novo* review of the Petitioner's petition, the answer and supplemental answer filed by the Respondent, the state court records, the Report of the Magistrate Judge, the Respondent's objections thereto, and all other filings in the cause. Upon such *de novo* review, the Court has concluded that the Report of the Magistrate Judge is correct and that the Respondent's objections are without merit.

ORDERED that the Respondent's objections are overruled and the Report of the Magistrate Judge is ADOPTED as the opinion of the District Court. It is further

ORDERED that the Petitioner's application for the writ of habeas corpus be and hereby is GRANTED as to the claim that his sentence was improperly enhanced. It is further

ORDERED that the Texas courts shall have ninety (90) days in which to re-sentence Haley without the improper enhancement of his sentence. It is further

ORDERED that the Petitioner's conviction shall be reversed if the Texas courts fail to re-sentence him within ninety days. It is further

ORDERED that the remaining claims raised by Haley in this petition be and hereby are DENIED. It is further

ORDERED that all motions which may be pending in this application are hereby

DENIED. Finally, it is

ORDERED that the Order of Reference to the United States Magistrate Judge is hereby VACATED. 28 U.S.C. §636(b).

SIGNED this 27th day of October, 2001.

/s/ T. John Ward
T. JOHN WARD
UNITED STATES DISTRICT JUDGE

[Final Judgment filed September 14, 2001]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

MICHAEL WAYNE HALEY §

v. § CIVIL ACTION NO. 6:00CV518

DIRECTOR, TDCJ-ID §

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

The Petitioner Michael Wayne Haley, an inmate of the Texas Department of Criminal Justice, Institutional Division proceeding *pro se*, filed this application for the writ of habeas corpus under 28 U.S.C. §2254 complaining of the legality of his conviction. The petition has been referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judges.

Haley states that he was convicted of theft in the 7th Judicial District Court of Smith County on October 29, 1997. He took a direct appeal of this conviction, which was affirmed by the Sixth Judicial District Court of Appeals on January 12, 1999. Haley filed a petition for discretionary review of this

decision, which was refused by the Texas Court of Criminal Appeals on May 26, 1999. Haley also filed a state habeas corpus petition on February 24, 2000; this petition was denied without written order on the findings of the trial court without a hearing by the Court of Criminal Appeals on June 21, 2000.

The facts of the case, as stated in the opinion of the Court of Appeals, are as follows:

> Chad Lanier, a loss prevention associate for Wal-Mart, testified that he observed Haley carrying a blue and white box, which Lanier believed contained a Texas Instruments calculator, down the back aisle of the store. Lanier testified that Haley turned his back to him and appeared to put the merchandise in the front of his pants. Haley then walked out of th store exit near the automotive department.
>
> Lanier then watched Haley get into a truck and drive around to the front of the store. Although Haley left the inside of the store, he remained on Wal-Mart property during the entire episode. Lanier never lost site of Haley. Haley then reentered the store through the front door carrying a blue and white box. Haley approached the service desk and was able to exchange the calculator for other merchandise. Lanier then approached Haley, identified himself as a loss prevention associate, and asked Haley to accompany him to the back of the store.

Haley v. State, slip op. no. 06-98-00040-CR (Tex.App.-Texarkana 1999, pet. ref'd).

In his petition, Haley raises four primary grounds for relief. These are: (1) there was no evidence to support the chronological order of the enhancements; (2) there was no evidence presented to support the State's claim that Haley had previously been convicted of robbery; (3) the State made an improper jury argument, and (4) Haley received ineffective assistance of counsel in nine particulars. The respondent has been ordered to answer the petition and has done so; Haley has filed a response to the answer. His grounds for relief will be addressed in turn.

In his first ground for relief, Haley says that his sentence in this case was enhanced by two prior convictions; no. 7-91-1086, for aggravated robbery, and no. 1-89-671, for delivery of a controlled substance. Haley points out that the enhancement portion of the indictment reads as follows:

> AND THE GRAND JURORS AFORESAID, do further present, that prior to the commission of the primary offense by the said MICHAEL WAYNE HALEY, to-wit: on the 9th day of September, 1992, in the 7th Judicial District Court of Smith County, Texas, in Cause Number 7-91-1086, the said MICHAEL WAYNE HALEY was convicted of the felony offense of Aggravated Robbery and said conviction became final prior to the commission of the primary offense.

> AND THE GRAND JURORS AFORESAID, do further present, that prior to the commission of each offense set out above by the said MICHAEL WAYNE HALEY, to-wit: on the 18th day of October, 1991, in the 241st Judicial District of Smith County, Texas, in Cause Number 1-89-671, the said MICHAEL WAYNE HALEY was convicted of the felony offense of Delivery of Amphetamine and said conviction became final prior to the commission of each of the offenses set out above.

According to Haley, the aggravated robbery in cause no. 7-91-1086 was committed on October 12, 1991, and the conviction in cause no. 1-89-671 did not become final until October 18, 1991. Thus, the indictment is incorrect in saying that the conviction in cause no. 1-89-671 became final "prior to the commission of each of the offenses set out above," and the jury incorrectly found the enhancement paragraphs to be true.

The Respondent sets the date for the commission of the aggravated robbery at October 15, 1991, rather than October 12, but concedes that Haley is correct in that the enhancement paragraph does not satisfy the provision in Texas law requiring that the second previous felony conviction be for an offense that occurred subsequent to the first previous conviction becoming final. Tex. Penal Code Ann. art. 12.42(a)(2). Nonetheless, the Respondent argues that Haley's sentence was improperly enhanced.

According to the Respondent's original answer, Haley's prior robbery conviction in cause no. 7-91-1086 carried a

finding that a deadly weapon was used in the commission of the offense. The Respondent states that Section 12.35 of the Texas Penal Code provides that a person convicted of a state jail felony shall be punished for a third degree felony if it is shown that the person had previously been finally convicted of any felony for which the judgment contains an affirmative finding of a deadly weapon. Additionally, the Respondent says, Haley had been previously convicted of the felony offense of delivery of a controlled substance, raising the level of punishment to that of a second-degree felony under Tex. Penal Code section 12.33. Haley received a sentence of 16 years and 6 months, falling within the range of a second degree felony; thus, the Respondent concludes that the punishment was properly enhanced.

Haley responds by saying that the sentence in cause no. 7-91-1086 did not contain a finding of a deadly weapon, indicating that this finding was removed by a *nunc pro tunc* judgment. The Respondent was ordered to answer this assertion and filed an answer essentially conceding that the finding of a deadly weapon had been removed, but arguing that Haley's claim on this point had been procedurally defaulted because he did not raise a timely objection to the enhancement provision.

Discussion and Analysis

The record shows that Haley was charged with the offense of theft of property valued at less than $1500.00, a Class A misdemeanor. This charge was enhanced by two prior theft convictions, occurring in 1989 and 1991, to a state jail felony.

According to the indictment, Haley also had previous convictions for robbery (cause no. 7-91-1086) and two cases for delivery of methamphetamine (cause no.'s 1-89-671 and 1-89-672). These offenses were used to enhance his offense to a second-degree felony, carrying a punishment range of two to 20 years in prison. Haley received a sentence of 16 years and six months, which was within this range.

Haley raises several challenges to the enhancement of his punishment. The first of these is that the robbery conviction did not become final prior to the commission of the other felony used for enhancement, the delivery of methamphetamine. The Respondent concedes that this is, in fact, correct, but argued in her initial answer that Haley's offense nonetheless was properly enhanced to a second-degree felony because the robbery involved the use of a deadly weapon. Haley argues, and the Director now concedes, that this finding was later removed, but the Director maintains that Haley's claim on this point is procedurally barred.

Under the Director's theory, Haley's present offense was enhanced to a state jail felony by this two prior convictions. It was then enhanced to a third degree felony by the robbery offense, and to a second degree felony by the offense of delivery of methamphetamine. The pertinent statutes, §§12.35 and 12.42 read as follows:

> §12.35 State Jail Felony Punishment
>
> (a) Except as provided by Subsection (c), an individual adjudged guilty of a state jail felony shall be punished by confinement in a state jail

for any term of not more than two years or less than 180 days.

(b) In addition to confinement, an individual adjudged guilty of a state jail felony may be punished by a fine not to exceed $10,000.

(c) An individual adjudged guilty of a state jail felony shall be punished for a third degree felony it if is shown on the trial of the offense that:

(1) a deadly weapon as defined by Section 1.07 was used or exhibited during the commission of the offense or during immediate flight following the commission of the offense, and that the individual used or exhibited the deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhibited; or

(2) the individual has previously been finally convicted of any felony:

(A) listed in Section 3g(a)(1), Article 42.12, Code of Criminal Procedure; or

(B) for which the judgment contains an affirmative finding under Section 3g(a)(2), Article 42.12, Code of Criminal Procedure.

§12.42 Penalties for Repeat and Habitual Felony Offenders

(a)(1) if it is shown on the trial of a state jail felony punishable under Section 12.35(a) that

the defendant has previously been finally convicted of two state jail felonies, on

conviction the defendant shall be punished for a third-degree felony.

(2) If it is shown on the trial of a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of two felonies, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished for a second-degree felony.

(3) If it is shown on the trial of a state jail felony punishable under Section 12.35(c) or on the trial of a third-degree felony that the defendant has been once before convicted of a felony, on conviction he shall be punished for a second-degree felony.

(b) If it is shown on the trial of a second-degree felony that the defendant has been once before convicted of a felony, on conviction he shall be punished for a first-degree felony.

(c) If it is shown on the trial of a first-degree felony that the defendant has been once before convicted of a felony, on conviction he shall be punished by imprisonment in the institutional division of the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 15 years. In addition to imprisonment, an individual may be punished by a fine not to exceed $10,000.

(d)(1) If it is shown on the trial of a felony offense other than a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by imprisonment in the institutional division of the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 25 years.

(subpart (D)(2) omitted)

Haley argues that the enhancement provisions are improper, because he was convicted of a state jail offense, but his prior offenses were not listed in Article 42.12, sec. 3(g), nor was there a finding that a deadly weapon was used in the commission of the offense; thus, he was convicted under Section 12.35(a), not 12.35(c). As stated above, although the indictment charged that he was convicted of two prior felonies, these being robbery and delivery of methamphetamine, the Respondent now concedes that the second was not committed before the first became final, and that the robbery conviction did not contain a finding of a deadly weapon so as to bring Haley under Section 12.35(c). Hence, Haley concludes, there is no basis for enhancement under Section 12.42, because he was convicted of a state jail felony under 12.35(a) with only *one* prior felony conviction.

This argument carries substantial force. The Respondent's answer thereto is that Haley is procedurally barred from challenging the enhancement provisions, because he did not do so at trial. The Respondent points to the decision of the Sixth Court of Appeals; however, the

discussion by that court of the error which occurred at trial focused on the fact that Haley was not given the opportunity to plead to the enhancement provisions at the beginning of the punishment phase, nor were the enhancement provisions read to the jury. Instead, the punishment phase opened with each side giving opening statements, and then the State put on evidence of Haley's prior convictions. Both sides rested and the jury was excused.

The trial judge then realized that the enhancement provisions had not been read to the jury and that Haley had not been given an opportunity to plead to them, so he brought the jury back in to reopen the punishment phase. Haley was given a chance to plead to the enhancements, but he declined to do so, requesting that the jury not be told that he had been given this opportunity. The jury was brought back in and the enhancement provisions were read, but no mention was made of either a plea by Haley or that he had been given the chance to do so. The State did not re-offer the evidence from the initial punishment phase and the defense did not stipulate to it, and Haley offered no objection to the reading of the enhancements or the failure to re-offer the evidence.

The Court of Appeals held that any error by the trial court in not requiring the previous evidence to be reintroduced, or by allowing the jury to consider the evidence presented before the reading of the enhancements, was waived by the failure to object. It is this holding upon which the Respondent bases her contention that Haley procedurally defaulted his claim.

As a general rule, federal review of a habeas corpus petition is procedurally barred if the last state court to consider

the claim expressly and unambiguously based its denial of relief on a state procedural default. Harris v. Reed, 489 U.S. 255 (1989). A procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar. Harris, 489 U.S. at 263.

In this case, while the state court denied relief on Haley's challenge to the enhancements, this challenge was based on what happened during the punishment phase of the trial, not on Haley's complaint that the robbery charge did not include a finding of a deadly weapon. Thus, it is by no means clear that Haley's claim on this point can be procedurally barred, because there is no indication that the state court which considered this claim, which was raised in the state habeas corpus proceeding, "expressly relied" on the state procedural bar. Furthermore, Haley could hardly have been expected to raise this challenge at sentencing, because the State was not relying on the alleged deadly weapon finding as support for the enhancement; rather, it was relying on the two prior convictions, for robbery and delivery of methamphetamine, as support for the enhancement.

Even if a procedural bar existed, however, it seems clear that Haley can be excused from it. The Fifth Circuit has held that a procedural bar may be avoided by a showing that failure to consider the claims will result in a "fundamental miscarriage of justice." The showing of a fundamental miscarriage of justice may be demonstrated by a showing that the petitioner is actually innocent. Lucas v. Johnson, 132 F.3d 1069, 1077 (5th Cir. 1998). In the context of non-capital

sentencing, the Fifth Circuit has indicated, albeit in dicta, that in order to show "actual innocence" of a non-capital sentence, the petitioner must show but for the constitutional error, he would not have been legally eligible for the sentence which he received. Sones v. Hargett, 61 F.3d 410, 419 and n. 16 (5th Cir. 1995).

In this case, the record shows beyond doubt that Haley's conviction was improperly enhanced from a state jail felony to a second-degree felony. The State originally justified the enhancement by alleging that Haley had two prior felony convictions, but this did not comport with the statute in that the second was not committed before the first became final. The State then sought to justify the enhancement by pointing to a finding that a deadly weapon was used in the commission of a prior offense, but overlooked the fact that this finding had been removed by a *nunc pro tunc* judgment. The final argument advanced by the State is that, even though Haley had the finding of the deadly weapon removed by a *nunc pro tunc* judgment in 1993, and the State did not rely on the alleged deadly weapon finding to enhance the present offense, he is nonetheless barred from raising the fact that there was no deadly weapon finding because he did not raise this fact in the very proceeding in which the State did *not* rely on the finding. Such a holding would condemn Haley to suffer the consequences of an affirmative finding which, by virtue of the *nun pro tunc* judgment, never existed. This would be a classic example of a "fundamental miscarriage of justice."

Furthermore, it is apparent that Haley has shown that he is "actually innocent" of a sentence for a second-degree felony. *See* Sones, 61 F.3d at 419. Haley is entitled to relief

on his claim regarding the improper enhancement of his sentence.[1]

In his third ground for relief, Haley complains that the State made an improper jury argument by "leading the jury to believe" that he had been in prison twice, rather than just once. The Fifth Circuit has stated that in federal habeas actions, improper jury argument by the state does not present a claim of constitutional magnitude unless it is so prejudicial that the petitioner's state court trial was rendered fundamentally unfair within the meaning of the Fourteenth Amendment's Due Process Clause. Felde v. Blackburn, 795 F.2d 400, 403 (5th Cir. 1986). To establish that a prosecutor's remarks are so inflammatory as to prejudice the substantial rights of a defendant, the petitioner must demonstrate either persistent and pronounced misconduct or that the evidence was so insubstantial that, in probability, but for the remarks no conviction would have occurred. Felde, 795 F.2d at 403, *citing* Kirkpatrick v. Blackburn, 777 F.2d 272, 281 (5th Cir. 1983).

The Supreme Court has stated that a prosecutor's remarks must be more than undesirable or even universally condemnable before reversal is warranted. Instead, the prosecutor's remarks must infect the trial with such unfairness as to make the resulting conviction a denial of due process. Darden v. Wainwright, 477 U.S. 187 (1986); *see also* Bell v. Lynaugh, 828 F.2d 1085, 1095 (5th Cir.), *cert. denied* 484

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1. Because of the disposition of this claim, it is unnecessary to address Haley's claim that there was no evidence to support the charge that he had a prior conviction for robbery.

U.S. 933 (1987); Drew v. Collins, 964 F.2d 411, 417 (5th Cir. 1992).

In this case, the record shows that Haley was convicted of delivery of methamphetamine on October 18, 1991, receiving a sentence of 12 years in prison. He was then convicted on September 9, 1992, of attempted robbery, receiving a sentence of 10 years in prison. Thus, while it is not clear whether or not Haley went to prison on two different occasions, he was clearly convicted of prior felonies on two different occasions.

Haley has failed to show that the prosecutor's remarks infected his trial with such unfairness as to make his conviction or sentence a denial of due process. He unquestionably was a repeat offender, regardless of how many times he actually went to prison, and so the alleged prosecutor's remarks did not rise to he level of a constitutional deprivation. Haley's claim on this point is without merit.

Next, Haley complains that he received ineffective assistance from his attorney, Herbert Isham, identifying nine specific instances of such alleged ineffectiveness. The first five of these concern counsel's performance regarding the enhancements. Because relief is to be granted regarding the erroneous enhancement, the Court will not address Haley's claims concerning the performance of counsel on this points.

In his sixth claim of ineffective assistance, Haley contends that counsel did not object to the prosecutor's allegedly improper remarks about the number of times that he had been to prison. To prevail on a claim of ineffective assistance of counsel, a state prisoner seeking federal habeas

corpus relief must show that his attorney's performance was deficient and that the deficiency prejudiced him to the point that he was denied a fair trial. Strickland v. Washington 466 U.S. 668, 678 (1984). This means that the habeas petitioner must establish both that (1) counsel's performance was deficient in that it fell below an objective standard of reasonable competence and (2) the deficient performance so prejudiced the defense that the outcome of the trial was unreliable and there is a reasonable probability that, but for counsel's performance, the result of the trial would have been different. Unless a petitioner makes both showings, he is not entitled to relief. Lavernia v. Lynaugh, 845 F.2d 493, 498 (5th Cir. 1988). The burden of proving ineffective counsel is on the petitioner. Hayes v. Maggio, 699 F.2d 198, 201 (5th Cir. 1983).

Here, Haley complains that Isham did not object to the prosecutor's argument by saying that Haley had only been to prison once, rather than twice. He has not shown that, had the jury known that he had two prior felony convictions but had only been to prison once, the result of the proceeding would probably have been different. Haley's claim on this point is without merit.

In his seventh point, Haley complains that his attorney did not file a motion for discovery. This is simply incorrect. Haley's attorney filed a motion for discovery of exculpatory evidence, a motion for the discovery of witnesses favorable to the defendant, a motion for production of witnesses' statements, and a motion for the production and inspection of evidence and information which may lead to evidence. *See*

Clerk's Record, pp. 11-22. Haley's claim on this point is without merit.

In his eighth point, Haley says that counsel "did not conduct an independent investigation" or interview the State's witnesses. He contends that had counsel conducted such an interview, he would have discovered that Haley "was never caught on videotape stealing anything," and that the videotape only shows him entering Wal-Mart once to return the calculator, not twice as alleged by the witnesses. He maintains that had counsel interviewed the witnesses, he would have known before trial that the witnesses were "putting the whole story together," and could have raised "serious doubts" about Haley ever being in the store prior to coming in and returning the calculator.

Adequate investigation is a requisite of effective assistance. Gray v. Lucas, 677 F.2d 1086, 1093 (5th Cir. 1982). To establish a constitutional violation, however, a defendant must show both a failure to investigate adequately and prejudice arising from that failure. Gray, 677 F.2d at 1093. A defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. U.S. v. Green, 882 F.2d 999, 1003 (5th cir. 1989).

Here, Haley offers nothing to show that a videotape even exists, much less that one shows what he says that it shows. Furthermore, the testimony at trial, from Lanier and from another associate named Fabian Arteaga, showed that they observed Haley pick up the calculator, leave the store from the back door, drive around to the front, and bring the

calculator into the store to try to get a refund or exchange. (Statement of Facts, vol. IV, pp. 38-48; vol. V, pp. 14-23). Haley offers nothing to show that, had Isham interviewed them prior to trial, either Lanier or Arteaga would have said anything different than the testimony which they presented at trial. Hence, his contention that a pre-trial interview would have demonstrated that Lanier and Arteaga were "putting the whole story together" and would have raised "serious doubts" about Haley's guilt is purely speculative and wholly fails to show prejudice arising from the alleged failure to investigate. Haley's claim on this point is without merit.

In his final, related point, Haley complains of counsel's failure to subpoena the "Wal-Mart videotape." However, as noted above, he fails to show that such a tape even exists. The Fifth Circuit has held that "[a]bsent evidence in the record, a court cannot consider a habeas petitioner's bald assertions on a critical issue in his pro se petition (in state and federal court), unsupported and unsubstantiated by anything else contained in the record, to be of probative evidentiary value." Ross v. Estelle, 694 F.2d 1008, 1011-12 and n.2 (5th Cir. 1983); *see* Koch v. Puckett, 907 F.2d 524, 530 (5th Cir. 1990). Haley's suggestion that a "surveillance video" exists or that it would "prove his innocence" are nothing but bald assertions, unsupported by anything in the record, and thus has no probative value.

Additionally, as the Respondent points out, even if the video existed and did not show Haley stealing the calculator, this would not prove that he had not done so, but only that the video did not show him doing so. The testimony at trial demonstrated that he attempted to evade detection by furtively

placing the calculator in his pants and exiting the store by the back door, then driving around and entering the front of the store to seek a refund or exchange. Haley cannot prove a negative by arguing that the video did not overtly record his stealing the calculator and therefore he did not do so, even if the video existed. Haley's claim on this point is without merit.

Haley also says that when he asked counsel to subpoena the video, Isham told him that it was not necessary because the State had the burden of proof. Again, however, Haley fails to show that such a video tape even existed, much less that it was exculpatory. Had it existed and been exculpatory, a subpoena would have been unnecessary because Isham had already moved for disclosure of exculpatory evidence; had the tape existed and been inculpatory, Isham would not have been entitled to discover it. As the Respondent points out, however, there is no evidence and no testimony that a surveillance video existed at all. Haley's claim on this point is without merit.

RECOMMENDATION

It is accordingly recommended that the Petitioner's application for the writ of habeas corpus be granted as to the claim that his sentence was improperly enhanced. It is further recommended that the Texas courts should be given ninety (90) days in which to re-sentence Haley without the improper enhancement of his sentence. It is further recommended that the Petitioner's conviction be reversed if the Texas courts fail to re-sentence him within ninety days. Finally, it is recommended that the remaining claims raised by Haley in this petition be denied.

A party's failure to file objections to the findings, conclusions, and recommendations contained in this Report within ten days after service with a copy thereof shall bar that party from *de novo* review by the district judge of those findings, conclusions, and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to factual findings and legal conclusions accepted and adopted by the district court.

Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

SIGNED this 13th day of September, 2001.

/s/ Judith K. Guthrie
Judith K. Guthrie
United States Magistrate Judge

(2)

JUL 1 0 2003

No. 02-1824

In the
Supreme Court of the United States

Janie Cockrell, Director,
Texas Department of Criminal Justice,
Institutional Division,

Petitioner,

versus

Michael Wayne Haley,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

MOTION TO PROCEED IN FORMA PAUPERIS

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ATTORNEY FOR RESPONDENT

19 pp

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MOTION TO PROCEED IN FORMA PAUPERIS

Michael Wayne Haley, respondent in the above styled Petition for Certiorari, moves the court to proceed in forma pauperis and in support would show the court the following.

United States Fifth Circuit Court of Appeals found the respondent indigent and appointed undersigned counsel to represent the respondent before that court.

The respondent has been continuously incarcerated since his conviction, has no funds or assets, and is indigent.

Therefore, the respondent moves this court to proceed in this matter in forma pauperis.

Respectfully submitted,

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ATTORNEY FOR THE RESPONDENT

Certificate of Service

On this the 17th day of July, 2003, the foregoing Motion to Proceed In Forma Pauperis has been sent via fax and United States mail, certified, return receipt requested to:

R. Ted Cruz
Solicitor General
Office of the Attorney General
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Eric M. Albritton

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RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEY FOR RESPONDENT

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SUP. CT. R. 15 1

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RESPONDENT'S BRIEF IN OPPOSITION

Michael Wayne Haley, respondent in the above-entitled and numbered cause, files this brief in opposition in accordance with SUP. CT. R. 15. In support, the respondent will show the following.

ARGUMENT

I. ADDITIONAL DEVELOPMENT OF THE ISSUE IN THE COURTS OF APPEAL IS WARRANTED PRIOR TO THIS COURT RESOLVING THE CIRCUIT SPLIT

There is a circuit split concerning whether a procedurally defaulted claim may be reached on the merits (absent a showing of cause and prejudice) if the habeas petitioner is actually innocent of

the noncapital punishment he received.[1] See, e.g., United States v. Mikalajunas, 186 F.3d 490, 495 (4th Cir. 1999); Spence v. Superintendent, 219 F.3d 162, 172 (2nd Cir. 2000); Embrey v. Hershberger, 131 F.3d 739, 743 (8th Cir. 1997) (en banc); Reid v. Oklahoma, 101 F.3d 1369 (10th Cir. 1996); Hope v. United States, 108 F.3d 119 (7th Cir. 1997). Although there is a circuit split, additional development of the issue in the courts of appeal is warranted prior to the Court resolving the circuit split.

The circuit split discussed by the petitioner, while existent, is not as well developed as she maintains. Three of the cases cited by the petitioner to establish a circuit split, Hope, 108 F.3d at 119, Mikalajunas, 186 F.3d at 495 and Embrey, 131 F.3d at 743, are appeals concerning motions to vacate, correct, or set aside sentences filed pursuant to 28 U.S.C. § 2255, rather than writs of habeas corpus filed in accordance 28 U.S.C. § 2254. As such, comity and federalism concerns which impact the analysis concerning federal review of state judgments[2] are not present, and, therefore, diminish the value of these cases to the debate of the specific issue raised in this case.[3] See Sean L. Dalton, Note, Carved in Sand: Actual Innocence in United States v. Maybeck, 73 N.C. L. Rev. 2388, 2401-02 (1995).

Further, two of these cases, Hope and Embrey, concern the application of the actual innocence exception to successive petitions rather than procedurally defaulted claims. This distinction is relevant because successive petitions are governed by 28 U.S.C. §§ 2244 and 2255, while procedurally defaulted claims raised in an original 28 U.S.C. § 2254 petition are not.[4]

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") significantly changed a petitioner's ability to file a previously raised claim in a successive petition and strictly limits the circumstances under which claims that were not previously raised may be filed in a successive petition. Jake Sussman, Unlimited Innocence: Recognizing an 'Actual Innocence' Exception to the AEDPA's Statute of Limitations, 27 N.Y.U. Rev. L. & Soc. Change 343, 352 (2001/2002); Bryan A. Stevenson, The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases, 77 N.Y.U. L. Rev. 699, 710 (2002). The AEDPA treats successive petitions under 28 U.S.C. § 2254 differently than successive motions filed pursuant to 28 U.S.C. § 2255. Randal S. Jeffrey, Successive Habeas Corpus Petitions and Section 2255 Motions After the Antiterrorism and Effective Death Penalty Act of 1996: Emerging Procedural and Substantive Issues, 84 Marq. L. Rev. 43, 123-25 (2000). The AEDPA completely bars a petitioner from raising a claim

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[1]The "actual innocence exception" is also known as the "miscarriage of justice exception." Sawyer v. Whitley, 505 U.S. 333, 339 (1992). These phrases will be used interchangeably.

[2]See Younger v. Harris, 401 U.S. 37, 44 (1971); McCleskey v. Zant, 499 U.S. 467, 491 (1991); Wainwright v. Sykes, 433 U.S. 72, 90 (1977). See also The Supreme Court – Leading Cases, 100 Harv. L. Rev. 100, 246 (1986).

[3]Certainly, the consideration of finality – also a basis of the procedural default doctrine – is equally relevant in federal review of both federal and state judgments. See Murray v. Carrier, 477 U.S. 478, 495-96 (1986) (doctrine of procedural default is based on considerations of comity and finality). See also United States v. Frady, 456 U.S. 152, 165 (1982) ("a final judgment commands respect" without regard to whether the judgment comes from a federal or a state court).

[4]This Court has not drawn a distinction between review of procedurally defaulted claims and claims raised in a successive petition. In Sawyer, this Court broadly stated that "[u]nless a habeas petitioner shows cause and prejudice, a court may not reach the merits of: (a) *successive claims* that raise grounds heard and decided on the merits in a previous petition; (b) new claims, not previously raised, which constitute an *abuse of the writ*; or (c) *procedurally defaulted* claims in which the petitioner failed to follow applicable state procedural rules in raising claims." Sawyer, 505 U.S. at 339 (internal citations omitted) (emphasis in original). In fact, this Court has stated that "[t]he doctrines of procedural default and abuse of the writ implicate nearly identical concerns flowing from the significant costs of federal habeas corpus review." McCleskey, 499 U.S. at 490-91.

that he or she raised in a prior petition. 28 U.S.C. § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."). Cf. 28 U.S.C. § 2255.

Moreover, 28 U.S.C. § 2244(b)'s miscarriage of justice exception concerning a new claim in a successive petition replaces the less onerous standard to establish actual innocence of the crime articulated in Murray v. Carrier, 477 U.S. at 495, with the standard announced in Sawyer. Sussman, supra at 493. The Seventh Circuit, in Hope, 108 F.3d at 120, held that the AEDPA precludes application of the actual innocence exception unless the movant is actually innocent of the crime and not merely the sentence.[5] Accord In re Jones, 137 F.3d 1271, 1274 (11th Cir. 1998) (holding that AEDPA forecloses successive petition on the basis of newly discovered evidence unless it challenges conviction, not merely sentence). Cf. Babbitt v. Woodford, 177 F.3d 744, 746 (9th Cir. 1999) (interpreting the provision "as permitting a petitioner to establish by clear and convincing evidence, that but for constitutional error, no reasonable jury would have found petitioner eligible for the death penalty") (citation omitted). The cases cited by the petitioner do not address the impact of the amendments to the statute made by the AEDPA, and, as such, further development of this issue is required. See Jeffrey, supra at 137.

Only two of the cases cited by the petitioner concerning the circuit split, Reid, 101 F.3d at 1369[6] and Spence, 219 F.3d at 172, are appeals of habeas petitions filed in accordance with 28

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[5]In dicta, the court implies that the actual innocence exception set out in Sawyer does not survive the amendment to the statute. See id. at 120.

[6]Reid applied the rule originally announced in United States v. Richards, 5 F.3d 1369, 1371 (10th Cir. 1993) (appeal concerning a motion brought pursuant to 28 U.S.C. § 2255). Reid applied the "rules and case law controlling abusive and successive habeas petitions when the district court rendered its decision in December 1995, several months before passage of the

U.S.C. § 2254, and only Spence discusses the actual innocence exception in the context of a procedurally defaulted claim.

The issue raised in Reid concerns a successive petition, and, therefore, is necessarily governed by 28 U.S.C. § 2244 and raises the same questions surrounding the impact of the AEDPA. See Hope, 108 F.3d at 120 ("We conclude that a successive motion under 28 U.S.C. § 2255 (and presumably a successive petition for habeas corpus under section 2254, governing habeas corpus for state prisoners, which has materially identical language) may not be filed on the basis of newly discovered evidence unless the motion challenges the conviction and not merely the sentence."). Spence, although addressing a procedurally defaulted claim in a 28 U.S.C. § 2254 petition, is distinguishable from this case. Here, the Fifth Circuit addressed the actual innocence exception where the petitioner was ineligible for the habitual punishment he received; in Spence, the Second Circuit was called upon to address the actual innocence exception where a habeas petitioner was not subjected to habitual punishment.[7] Spence, 219 F.3d at 171.

The courts of appeal need to consider more fully whether a procedurally defaulted claim raised in a petition for habeas corpus filed in accordance with 28 U.S.C. § 2254 may be reached on the merits (absent a showing of cause and prejudice) if the habeas petitioner is actually innocent of

---

Antiterrorism and Effective Death Penalty Act of 1996 . . .. However, [the court stated that it] would reach the same result under the even more restrictive standards contained in Title I of the AEDPA." Id. at n.2 (internal citations omitted).

[7]The Fifth Circuit's opinion, in dicta, rejects the Second Circuit's position by stating that the actual innocence exception should apply only in noncapital cases where the petitioner is sentenced as a habitual offender. See Haley v. Cockrell, 306 F.3d 257, 265 (5th Cir. 2002) (Haley I) ("[W]e agree with the Fourth Circuit which has held that the actual innocence exception applies to noncapital cases only in the context of a habitual offender finding during the punishment phase of the trial.").

the noncapital punishment he received before this Court grants certiorari. Specifically, the courts of appeal need to consider the impact of the AEDPA on whether the actual innocence exception continues to be equally applicable in the context of procedurally defaulted claims and successive or abusive petitions, the differing rationales for the rule underpinning review of federal judgments by federal courts and state judgments by federal courts, and the use of a habitual offender statute.

II. THE COURT OF APPEALS CORRECTLY APPLIED SUPREME COURT PRECEDENT AND, AS SUCH, THE ISSUE IS NOT AN IMPORTANT QUESTION OF FEDERAL LAW.

In Wainwright, 433 U.S. at 87, the Court held that a procedurally defaulted claim could be reached by a federal habeas court if the petitioner showed cause for the default as well as prejudice attendant to the alleged error. The Court discussed an exception to the requirement of establishing cause and prejudice in Murray v. Carrier, 477 U.S. 478 (1986). There, the Court held that a procedurally defaulted claim could be reviewed on the merits without the showing of cause and prejudice if the failure to do so would result in a fundamental miscarriage of justice. Id. at 496. Smith v. Murray, 477 U.S. 527 (1986), decided the same day as Murray v. Carrier, contemplated the applicability of this exception in the context of capital sentencing. In so doing, the Court acknowledged that actual innocence "does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense." Id. at 537. Nevertheless, this Court in Sawyer, 505 U.S. at 348, held that a procedurally defaulted claim could be reviewed "if petitioner has shown by clear and convincing evidence that, but for constitutional error, no reasonable juror would find him eligible for the death penalty under [the applicable state law]."[8] This is an "eligibility" test.[9]

[8]This is a more onerous standard than required to establish actual innocence of the underlying offense. See Murray v. Carrier, 477 U.S. at 495 (a habeas petitioner must show that a "constitutional violation has probably resulted in the conviction of one who is actually

See Schlup v. Delo, 513 U.S. 298, 323 (1995). That is, there is a fundamental miscarriage of justice when the petitioner is ineligible under state law for the penalty assessed. Sawyer, 505 U.S. at 347.

The Sawyer eligibility test is narrow and easily applied to noncapital sentences. See Sawyer, 505 U.S. at 340 (the actual innocence exception is tailored to be narrow and subject to determination by relatively objective standards). "An individual is either eligible or not eligible to receive a particular sentence." Embrey, 131 F.3d at 744 (dissent). It is less difficult to apply in the context of a noncapital habitual enhancement error than in the context of a capital sentence. For instance, it is more difficult and less objective to determine whether a petitioner has shown by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found him or her to be a future danger as is required to be death eligible under Texas law or that "the offense was committed in an especially cruel, atrocious and heinous manner," as required by Louisiana law when Sawyer was tried,[10] than to determine whether the petitioner's prior felony convictions are sequential as required by Texas law.

This Court has never held that the actual innocence exception, articulated as an eligibility test in Sawyer, does not extend to cases involving challenges to a noncapital sentence and there is no principled reason to restrict the Sawyer analysis to capital sentences. Embrey, 131 F.3d at 743 (dissent). In fact, in Smith v. Murray, 477 U.S. at 538-39, this Court suggested "that the availability of [the] actual innocence exception depends not on the 'nature of the penalty' . . ., but on whether

innocent").

[9]The Court has recently addressed punishment eligibility in a series of cases. See, e.g., Jones v. United States, 526 U.S. 227 (1998); Apprendi v. New Jersey, 530 U.S. 466 (2000); Ring v. Arizona, 536 U.S. 584 (2002).

[10]Sawyer, 505 U.S. at 337 n.2.

the constitutional error 'undermined the *accuracy* of the guilt or sentencing determination.'" Spence, 219 F.3d at 170-71 (quoting Smith v. Murray, 477 U.S. at 538-39) (emphasis added).

The nature of the punishment is not a legitimate basis for differentiating capital and noncapital cases, and, therefore, capital petitioners and noncapital petitioners should not be afforded different measures of justice. Smith, 477 U.S. at 538-39 (rejecting the idea that "the principles of Wainwright v. Sykes apply differently depending on the nature of the penalty a State imposes for violation of its criminal law"); James J. Sticha, Note, To Be or Not To Be? The Actual Innocence Exception in Noncapital Sentencing Cases, 80 Minn. L. Rev. 1615, 1626-27 (1996); see also Herrera v. Collins, 506 U.S. 390, 405 (1993) (the death penalty does not mandate a higher standard of review in federal habeas); Murray v. Giarratano, 492 U.S. 1, 9 (1989) (same). The Fourth Circuit's logic on this point is compelling. Except for the obvious difference in the severity of the sentence, there is little difference between holding that a defendant can be innocent of the acts required to enhance a sentence to death and applying a parallel rationale in noncapital cases. United States v. Maybeck, 23 F.3d 888, 893 (4th Cir. 1994). Hence, a defendant in either a capital or noncapital case would, unless excepted from the cause and prejudice requirement, suffer the same general consequence (an enhanced sentence) from being held responsible for an act of which he or she is actually innocent. Id. Simply put, "[b]ecause the harshness of the sentence does not affect the habeas analysis and the ultimate issue, the justice of the incarceration, is the same, there is no reason why the actual innocence exception should not apply to noncapital sentencing procedures." Spence, 219 F.3d at 171.

Furthermore, there is no procedural habeas rule that draws a distinction based on the punishment assessed. For instance, a petitioner must exhaust his state court remedies in capital and

noncapital cases. Similarly, no distinction is drawn between capital and noncapital cases when analyzing the presence of cause and prejudice for successive claims and abusive writs. See, e.g., Kuhlmann v. Wilson, 477 U.S. 436 (1986); McCleskey, 499 U.S. at 467. More to the point, however, the procedural default rule draws no distinction between defaults in capital cases and noncapital cases. As such, there is no reason why an exception to that rule should draw a distinction.

The Fifth Circuit logically extended this Court's precedent and correctly held that a procedurally defaulted claim may be reached on the merits (absent a showing of cause and prejudice) if the habeas petitioner is actually innocent of the noncapital punishment he received.[11] This conclusion is confirmed by the Court's unyielding recognition that the writ is an equitable remedy mandated by justice. See Kuhlmann, 477 U.S. at 447. "The writ should be available whenever there clearly has been a fundamental miscarriage of justice for which no other adequate remedy is presently available." Sunal v. Large, 332 U.S. 174, 189 (1947) (Rutledge, J., dissenting). Accordingly, this Court should not grant certiorari.

III. THIS CASE IS NOT THE IDEAL VEHICLE FOR THE COURT TO CONSIDER WHETHER A PROCEDURALLY DEFAULTED CLAIM MAY BE REACHED ON THE MERITS (ABSENT A SHOWING OF CAUSE AND PREJUDICE) IF THE HABEAS PETITIONER IS ACTUALLY INNOCENT OF THE NONCAPITAL PUNISHMENT HE RECEIVED.

The respondent's claim arises in the context of a habitual offender sentence, and, as such, does not raise the broader issue of whether the actual innocence exception should apply when the habeas petitioner is ineligible for the unenhanced, noncapital sentence he received. The Court should grant certiorari in a case raising the broader issue because any statement made in the context of this case concerning the availability of the actual innocence exception in a case where the defendant was

---

[11] Sticha, supra at 1647.

not subjected to habitual punishment will be dicta, thereby failing to sufficiently apprise bench and bar of the state of the law.

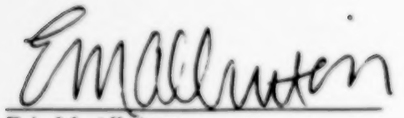
Further, this Court should not grant certiorari in this particular case because it can be granted in another case raising this issue where the wrongfully incarcerated person is not deprived of one day of his due liberty, such as a case where the habeas petitioner loses below, and is awaiting this Court's decision affirming the Court of Appeals. The respondent should not bear the burden of one additional day of admittedly unjust incarceration[12] so that this issue can be resolved when there are adequate alternative avenues available to resolve the issue at no cost to a wrongly incarcerated person.

CONCLUSION

Based on the reasons discussed above, the Court should not grant the petition for writ of certiorari.

[12]The petitioner admits that "there is no dispute that Haley's punishment was improperly enhanced under the statute." Petitioner's Petition for Writ of Certiorari at 5, Haley v. Cockrell (No. 02-1824).

Respectfully submitted.



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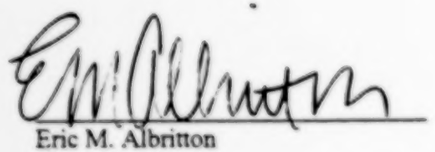

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(3)

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No. 02-1824

In the Supreme Court of the United States

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Petitioner,

v.

MICHAEL WAYNE HALEY,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

The Director's petition for writ of certiorari raises an important issue of federal law that has generated a significant and well-developed circuit split. Haley concedes (1) the courts of appeals are split (although he attempts to diminish the severity of the split by pointing out irrelevant procedural differences in the cases); (2) the importance of the issue; and (3) that there are no factual disputes or procedural hurdles to impede the Court's ability to resolve the issue presented. Accordingly, the Court should grant the petition to resolve this important issue of federal law that has so deeply divided the courts of appeals.

I. THE COURT SHOULD RESOLVE THE CIRCUIT SPLIT REGARDING WHETHER THE "ACTUAL INNOCENCE" EXCEPTION TO THE PROCEDURAL BAR RULE APPLIES TO NONCAPITAL SENTENCING ERROR.

The question whether the "actual innocence" exception to the procedural bar rule applies to noncapital sentencing phase error has plagued the courts of appeals for over a decade. It has so far split six circuits in three ways. The conflict shows no signs of resolving itself, but instead appears destined to become only more entrenched.

Nevertheless, in an attempt to dissuade the Court from granting the petition, Haley incorrectly contends that the split is not sufficiently developed to warrant this Court's attention. Resp., at 2. Haley bases his claim on the rather unremarkable fact that the procedural settings of the various cases creating the split are not identical. Resp., at 2-6. Haley points out that three of the decisions behind the persistent conflict—*United States v. Mikalajunas*, 186 F.3d 490 (CA4 1999), *Embrey v. Hershberger*, 131 F.3d 739 (CA8 1997) (en banc), and *Hope*

v. United States, 108 F.3d 119 (CA7 1997)—involved motions pursuant to 28 U.S.C. §2255, rather than 28 U.S.C. §2254. Resp., at 2. And, he notes that *Embrey* and *Hope* concerned the application of the "actual innocence" exception to successive petitions rather than procedurally defaulted claims. *Id.*, at 3.

The distinctions identified by Haley do not diminish the disagreement between the circuits, nor do they support his suggestion that the issue should be allowed to percolate further in the courts of appeals.

A. The Courts of Appeals's Use of the "Actual Innocence" Exception Under 28 U.S.C. §2254 Is Identical to that Under 28 U.S.C. §2255.

Haley's erroneous suggestion that the division among the courts of appeals is not sufficiently developed to warrant the Court's attention rests on the false premise that the "actual innocence" exception varies depending upon whether the writ is brought under 28 U.S.C. §2254 (state custody) or 28 U.S.C. §2255 (federal custody). However, the Court has never distinguished between "actual innocence" as it pertains to §2254 cases and those arising under §2255. Neither have the courts of appeals perceived such a distinction. For example, in *Embrey*, a §2255 case, the Eighth Circuit applied the Court's "actual innocence" doctrine developed in *Sawyer v. Whitley*, 505 U.S. 333 (1992), and *Smith v. Murray*, 477 U.S. 527 (1986)—which were both §2254 cases—with no indication that a different standard should apply. Indeed, Haley does not cite a single case making this distinction.

And while it may be true that in a §2255 case, a federal habeas court is not constrained by the federalism concerns present in a §2254 case, that distinction has no bearing on the application of the "actual innocence" exception. *See McClesky v. Zant*, 499 U.S. 467, 493 (1991) (noting that although the abusive-of-the-writ doctrine may not always implicate federalism concerns, as the procedural default doctrine generally does, the same miscarriage of justice standard , *i.e.*, the "actual innocence" exception, applies in both contexts). The mere distinction of the two procedural settings does not diminish the clarity and steadfastness of the courts of appeals's disagreement.

B. The "Actual Innocence" Exception Applies Equally to Procedurally Defaulted Claims and to Claims Barred by the Abuse-of-the-Writ Doctrine.

Haley's claim that a different "actual innocence" standard may apply to successive petitions, as opposed to procedurally barred claims, is likewise refuted by the Court's "actual innocence" jurisprudence. The Court held in *McClesky* that the miscarriage of justice exception—also known as the "actual innocence" exception—applies equally to successive writs as it does to procedurally barred claims. *Id.*, at 493-95.

Indeed, the Court left no room for speculating, as Haley does, that the law may be otherwise. Observing that "[t]he doctrines of procedural default and abuse of the writ implicate nearly identical concerns flowing from the significant costs of federal habeas corpus review," *id.*, at 490-91, the Court held that the principles behind the application of the "actual innocence" exception do not differ when used to excuse a procedural default or to avoid a bar on successive petitions.

See id., at 493. Indeed, "the unity of structure and purpose in the jurisprudence of state procedural defaults and abuse of the writ" requires that "the standard for excusing a failure to raise a claim at the appropriate time should be the same in both contexts." *Id*; *cf. Sawyer*, 505 U.S., at 335 (framing the issue presented as "whether a petitioner bringing a *successive*, abusive, or *defaulted* federal habeas claim has shown he is 'actually innocent' of the death penalty . . . so that the court may reach the merits of the claim") (emphasis added).

The principle of "actual innocence" applies equally to the various contexts identified by Haley and no court has never held otherwise. The fact that the "actual innocence" exception is available in several areas of habeas law only serves to highlight the importance of the question whether it should be extended to noncapital sentencing error. The conflict in the courts of appeals is real, well-developed, and deserving of resolution by this Court.

II. This Case Squarely Presents an Issue That Requires Resolution.

Haley does not, and cannot, take issue with the description of this case by the dissent from the denial of rehearing en banc, as one of a "purely legal question . . . unsullied by factual disputes . . . [that] squarely presents a legal question of exceptional importance in an unusually pristine form." *Haley v. Cockrell*, 325 F.3d 569, 570 (CA5 2003) (Smith, J., dissenting). Instead, Haley urges the Court to deny the Director's petition and defer resolution of this issue until the Court is presented with a case that does not involve application of a habitual offender statute, or one in which the habeas petitioner was not improperly sentenced.

The Court should reject Haley's invitation to delay review of this issue. Waiting for a noncapital case that does not implicate a habitual offender statute is not only unnecessary, but it would be unadvisable because it would introduce more uncertainty into this area of the law. A decision by the Court in this case that the "actual innocence" exception does not excuse a procedurally defaulted claim would govern cases not involving habitual offender statutes, thus providing a clear rule that is not limited by its particular circumstances.

By contrast, waiting for a noncapital case that involves a non-habitual offender statute would result in a decision of limited utility. If the Court were to resolve the issue presented by such a case, the availability of the exception in the context of habitual offender statutes would remain an open question and a divisive issue among the courts of appeals. The Court should not decide this issue piecemeal. It should grant the petition in this case to provide a single rule concerning the "actual innocence" exception in noncapital sentencing.

Similarly, the Court should not, as Haley suggests, await a case in which the habeas petitioner was not improperly sentenced. Such a case would likely be encumbered with fact disputes that are not present in this case.

This case squarely presents the question whether the "actual innocence" exception will excuse a procedurally defaulted claim that a noncapital sentence was wrongfully applied. The Court should grant the petition and resolve this important and unsettled question of federal law.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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July 28, 2003

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No. 02-1824

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In The
Supreme Court of the United States

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Petitioner,

v.

MICHAEL WAYNE HALEY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RELEVANT DOCKET ENTRIES

No. 00-CV-518
In the United States District Court for the Eastern District of Texas, Tyler Division

Haley

v.

Director

DATE	#	PROCEEDINGS
08/24/2000	1	Petition for writ of habeas corpus [Date Entered: 08/24/00, By: mxr]
08/24/2000	3	ORDER referring case to Magistrate Judge Judith K. Guthrie (copy file sent) (signed by Judge T. John Ward) form to pet 8/24/00 [Date Entered: 8/24/00, By: mxr]
01/24/2001	14	Answer to Original Petition by Director, TDCJ-ID [Date Entered: 01/24/02, By: mll]
02/14/2001	15	Response by Michael Wayne Haley to [14-1] answer [Date Entered: 02/14/01, By: mh]
03/15/2001	- -	State Court records received from AAG; placed in original file [Date Entered: 03/16/01, By: mh]
03/29/2001	17	MOTION by Michael Wayne Haley to Supplement State Court Records [Date Entered: 04/11/01, By: mh]

04/26/2001	18	ORDER granting [17-1] motion to Supplement State Court Records; ordered that the respondent shall have 30 days to respond or otherwise plead to Haley's contention that he has not been convicted of a felony carrying an affirmative finding that a deadly weapon was used in the commission therein; set notice of compliance due for 5/29/01 for Director, TDCJ-ID (signed by Magistrate Judge Judith K. Guthrie) ccL JKG, parties 4/26/01 [Date Entered: 04/26/01, By: mh]
07/25/2001	27	Response by Director, TDCJ-ID to [18-1] order [Date Entered: 07/25/01, By: mh]
09/14/2001	28	Report and Recommendations of Magistrate Judge Judith K. Guthrie recommends that the petitioner's application for the writ of habeas corpus be granted as to the claim that his sentence was improperly enhanced; it is furtherrecommended [sic] that the Texas courts should be given 90 days in which to re-sentence Haley w/o the improper enhancement of his sentence; it is further recommended that the petitioner's conviction be reversed if the Texas courts fail to re-sentence him within 90 days; finally, it is recommended that the remaining claims raised by Haley in this petition be denied as to Michael Wayne Haley; Objections to R and R due by 9/24/01 cc: JKG, parties [Date Entered: 09/14/01, By: mh]

10/18/2001	33	Objections by Director, TDCJ-ID [28-1] report and recommendations [Date Entered: 10/18/01, By: ehs]
10/29/2001	34	Memorandum Opinion and Order adopting report and recommendations [28-1]; granting [1-1] petition; ordered that the Texas courts shall have 90 days to resentence Haley w/o the improper enhancement of his sentence; set notice of compliance due for 1/29/02; ordered that the petitioner's conviction shall be reversed if the Texas courts fail to resentence him within 90 days; ordered that the remaining claims raised by Haley in this petition be and hereby are denied; ordered that all motions which may be pending are denied; vacating [3-1] referral/referred order (signed by Judge T. John Ward) cc: TJW, JKG, parties 10/29/01 [Date Entered: 10/29/01, By: mh]
10/29/2001	35	Final Judgment ordered that relief granted to the petitioner as to his claim that his sentence was improperly enhanced. The application for the writ of habeas corpus is granted as to this claim, and the State of Texas shall have 90 days in which to resentence Haley w/o the improper enhancement of his sentence. Should the State fail to do so, his conviction shall be reversed. Order that no relief is granted to Haley on the remaining claims in his petition (signed by Judge T. John Ward) cc: TJW, JKG, parties 10/29/01 [Date Entered: 10/29/01, By: mh]

11/05/2001	36	MOTION by Director, TDCJ-ID to alter/amend [35-1] judgment order [Date Entered: 11/06/01, By: mh]
11/21/2001	37	Notice of appeal by Director, TDCJ-ID of [35-1] judgment order. Fee Status: paid (notice of appeal and docket sheet sent to Fifth Circuit) cc: all parties, JW [Date Entered: 11/26/01, By: ehs]
12/11/2001	39	ORDER granting [36-1] motion to alter/ amend [35-1] judgment order. Ordered that the Memorandum Opinion and Final Judgment are AMENDED, nunc pro tunc, so as to specify and make clear that the 90-day time period in which tore-sentence Haley without the improper enhancements commences upon the date of entry of final judgment, October 29, 2001. This order, and the 90-day time period, is subject to any stays which may be granted by this Court or by the Fifth Circuit pending the Directors appeal in this case. (signed by Judge T. John Ward) cc: all parties, JW, USCA [Date Entered: 12/12/01, By: ehs]

* * * * * * * *

RELEVANT DOCKET ENTRIES

No. 01-41389
In the United States Court of Appeals
for the Fifth Circuit

Haley

v.

Cockrell

DATE	PROCEEDINGS
11/30/01	Prisoner case docketed without counsel. NOA filed by Appellant Janie Cockrell. [01-41389] (jtr)
12/20/01	Motion filed by Appellant Janie Cockrell for stay pending appeal. [3462711-1] Sufficient [Y/N]: Y. [01-41389] (pac)
1/14/02	COURT Order filed granting appellant's motion for stay pending appeal. The Order and Final Judgment of the US District Court of the Eastern District of Texas, Tyler Division, entered on October 29, 2001, which grants Haley habeas corpus relief is hereby stayed during the appeal of this case. The clerk shall set a briefing schedule for the consideration of this appeal on the merits [3462711-1] (HRD, RMP, JLD) Copies to all counsel. [01-41389] (tdc)
2/8/02	Appellant's Brief filed by Appellant Janie Cockrell. Copies of brief: 7 # of pages: 19. Disk Provided [Y/N]: Y. Date of COS: 2/5/02 Sufficient [Y/N]: Y. [01-41389] A/Pet's Brief ddl satisfied. E/Res's Brief due on 3/11/02 for Michael Wayne Haley. (kgc)

3/1/02 Appellee's Brief filed by Appellee Michael Wayne Haley. Copies of Brief: 4 # of pages: 4. Disk Provided [Y/N]: n Sufficient [Y/N]: y. [01-41389] E/Res's Brief ddl satisfied. Reply Brief due on 3/15/02 for Janie Cockrell. (rsm)

3/26/02 Reply brief filed by Appellant Janie Cockrell. Copies of Brief: 7 # of pages: 4. Disk Provided [Y/N]: Y Date of COS: 03/22/02 Sufficient [Y/N]: Y. [01-41389] Reply Brief ddl satisfied. (sbs)

7/24/02 Case calendared without oral argument. Ctrm. Deputy: Wanda [01-41389] (wfd)

9/27/02 Opinion filed. If Published # of pages: 10 Issue Mandate due on 10/18/02. [01-41389] (kgc)

10/21/02 Petition filed by Appellant Janie Cockrell for rehearing en banc. # of copies filed: 20 [3848754-1] Sufficient [Y/N]: Y. [01-41389] (rjd)

11/22/02 Response/opposition filed by Appellee Michael Wayne Haley to petition for rehearing en banc [3848754-1] by Appellant Janie Cockrell Response/Opposition ddl satisfied. Sufficient [Y/N]: Y. [4025906-1] [01-41389] (pac)

3/19/03 COURT Order filed denying petition for rehearing en banc (IN DETAIL) [3848754-1] With poll (Y/N)?: Y Issue Mandate due on 3/26/03. (JES, dissenting, joined by EGJ, EHJ, RHB, EMG, & EBC) Copies to all counsel. [01-41389] (kgc)

4/25/03 COURT Order filed denying appellant's motion to stay mandate [4170642-1] Copies to all counsel. [01-41389] (jtr)

4/25/03 Mandate issued. Approved BOC Issued (Y/N) ?: n [01-41389] Issue Mandate ddl satisfied. (rf)

* * * * * * * *

RELEVANT DOCKET ENTRIES

No. 02-1824
In the
Supreme Court of the United States

Doug Dretke, Director,
Texas Department of Criminal Justice,
Institutional Division

v.

Michael Wayne Haley

DATE	PROCEEDINGS
June 13, 2003	Petition for writ of certiorari filed. * * *
October 14, 2003	Petition GRANTED.

* * * * * * * *

INDICTMENT

007-80674-97

THE STATE OF TEXAS
VS
MICHAEL WAYNE HALEY

IN THE 7th DISTRICT COURT OF SMITH COUNTY, TEXAS

CHARGE: Theft 23990009 ARTICLE:(4)(E)
CONTROL# 9704416

IN THE NAME AND BY THE AUTHORITY

OF THE STATE OF TEXAS:

THE GRAND JURORS, duly selected, organized, sworn and impaneled as such for the County of Smith, State of Texas, at the January - June Term, 1997, of the 7th Judicial District Court for said County, a quorum thereof being present, upon their oaths present in and to said Court that on or about the 9th day of April, 1997, and anterior to the presentment of this Indictment, in the County and State aforesaid, MICHAEL WAYNE HALEY did then and there unlawfully appropriate property, by acquiring and exercising control over, property, to-wit calculator, of the value of ~~Five Hundred ($500.00) Dollars or more, but~~ less than One Thousand Five Hundred ($1500.00) Dollars, from CHAD LANIER, the owner thereof without the effective consent of the owner, with intent to deprive said owner of the property:

And it is further presented in and to said Court, that before the commission of the offense alleged above, the said MICHAEL WAYNE HALEY had theretofore been twice convicted of a grade of Theft in that on the 3rd day of December, 1991, in the County Court at Law of Smith County, Texas, in Cause Number 94,664, the said

MICHAEL WAYNE HALEY was convicted of the offense of Theft, and on the 28th day of March, 1989, in the County Court at Law No. Two of Smith County, Texas, in Cause Number 81,358-A, the said MICHAEL WAYNE HALEY was convicted of the offense of Theft;

AND THE GRAND JURORS AFORESAID, do further present that prior to the commission of the primary offense by the said MICHAEL WAYNE HALEY, to-wit: on the 9th day of September, 1992, in the 7th Judicial District Court of Smith County, Texas, in Cause Number 7-91-1086, the said MICHAEL WAYNE HALEY was convicted of the felony offense of ~~Aggravated~~ Robbery and said conviction became final prior to the commission of the primary offense;

AND THE GRAND JURORS AFORESAID, do further present that prior to the commission of each offense set out above by the said MICHAEL WAYNE HALEY, to-wit: on the 18th day of October, 1991, in the 241st Judicial District Court of Smith County Texas, in Cause Number 1-89-671, the said MICHAEL WAYNE HALEY was convicted of the felony offense of Delivery of Amphetamine and said conviction became final prior to the commission of each of the offenses set out above;

AND THE GRAND JURORS AFORESAID, do further present that prior to the commission of each offense set out above by the said MICHAEL WAYNE HALEY, to-wit: on the 18th day of October, 1991, in the 241st Judicial District Court of Smith County Texas, in Cause Number 1-89-672, the said MICHAEL WAYNE HALEY was convicted of the felony offense of Delivery of Amphetamine and said conviction became final prior to the commission of each of the offenses set out above;

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/
Foreman of the Grand Jury

[FILED
AUG 21 1997
2:40 p.m.
R. BRAD BURGER
CLERK]

[FILED
R. BRAD BURGER
DISTRICT CLERK
___ JUN -5 PM 8:04
/s/
Deputy

CRIMINAL DOCKET

Case No. 007-80674-97

Number of Case	**Names of Parties**
007-80674-97	THE STATE OF TEXAS
	VS.
	~~MICHALE~~ MICHAEL WAYNE HALEY

* * * [irrelevant information omitted]

DATE OF ORDERS	**ORDERS OF COURT**
* * *	
July 24 1997	Upon affidavit of Defendant that he does not have Counsel and that he does not have money or property with which to employ Counsel, Hon. Herbert Isham is appointed to represent Defendant.
* * *	
8 5 97	Motion to Amend & Interlineate Indictment
8 21 97	Order Amending & interlineating indictment
* * *	
10 29 97	The Court calls case to resume trial - Punishment phase of the trial. Charge prepared and objections made to the charge, charge read to the jury. Jury released to deliberate. Jury Returned a verdict of 16 yrs & 6 months TDCJID Credit 146 Days
* * *	
11 26 97	m/to w/draw
12 22 97	ord. to w/draw
* * *	

[FILED

R. BRAD BURGER
Clerk 7th Jud. Dist. Court
Smith Co., Tx
By /s/ Deputy]

CAUSE NO. 007-80674-97

THE STATE OF TEXAS	§	IN THE 7TH JUDICIAL
VS.	§	DISTRICT COURT OF
Michael Wayne Haley	§	SMITH COUNTY, TEXAS

ORDER APPOINTING COUNSEL

ON THIS DAY came on to be considered Defendant's affidavit in which he has sworn that he is too poor to employ counsel to represent him, and having considered all matters properly before the Court regarding Defendant's inability to employ counsel,

IT IS HEREBY ORDERED that H. Isham, an attorney licensed to practice in the State of Texas, be and is hereby appointed to represent the Defendant in said cause.

SIGNED on this the _____ day of Jul 24 1997, 19_____.

/s/
HONORABLE LOUIS B. GOHMERT, JR.
JUDGE 7TH JUDICIAL DISTRICT COURT
SMITH COUNTY, TEXAS

wlypg40

EXCERPT FROM PRETRIAL HEARING

October 27, 1997
In the 7th Judicial District Court of Smith County, Texas

The State of Texas

7-80674-97

v.

Michael Wayne Haley

* * *

[19]

MR. HARRIS: Judge, at this point in time the State is going to move to abandon certain language in the enhancement paragraph of the indictment.

THE COURT: Go ahead.

MR. HARRIS: Judge, in the first full enhancement paragraph, first full punishment enhancement paragraph, the Defendant we have alleged was convicted of the felony offense of aggravated robbery. The State wishes to delete or abandon the aggravated portion of that charging – that enhancement paragraph so all that will remain is the word robbery.

THE COURT: Okay. Then I will order you to make the change upon the indictment itself.

* * *

EXCERPT FROM TRANSCRIPT OF
SENTENCING HEARING

October 29, 1997
In the 7th Judicial District Court of Smith County, Texas

The State of Texas

7-80674-97

v.

Michael Wayne Haley

* * * * * * * *

[6]

THE COURT: Then the State may proceed with a brief opening statement.

MR. HARRIS: Thank you, Judge. Good morning, Ladies and Gentlemen of the Jury. Welcome back to the 7th District Court. I'm going to be brief this morning. Let me tell you first of all how much I thank you and respect the verdict you returned yesterday. I understand it's a very difficult thing to do to find a person guilty of a felony offense. I appreciate the hard work that you've done so far, and I'm asking you to stick with us just a little bit longer because your job is only half done. As a matter of fact, I would submit to you the most important part of your job remains and that is to determine the appropriate punishment to give to this Defendant in this particular case.

To assist you in doing so, we're going to present to you some documents this morning indicating that this is not the Defendant's first rodeo. For those of you who have [7] listened to Paul Harvey before, and you may have suspected over the past day or so, there's more of the story to be told. Now you're about to hear the rest of that story.

That is, this Defendant has been to prison before. As a matter of fact, he's been to prison more than once. You're going to hear evidence, see evidence in the form of penitentiary packets, paperwork from the Texas Department of Criminal Justice which is going to indicate to you this Defendant has been to the penitentiary for robbery, has been to the penitentiary for delivery of a controlled substance. I anticipate the evidence is going to show you that when he went down on the robbery charge, he spent ten years in prison. He was sentenced to ten years in prison, and he went down on a delivery of amphetamines and he was sentenced to a 12-year prison sentence. That's the kind of man we're dealing with in this particular case.

At the conclusion of the evidence this morning, which I anticipate is going to be very shortly, I'm going to be back in front [8] of you again. Ms. Cromer is going to be in front of you again, and we're going to ask you to send this man to prison where he belongs. Thank you very much.

THE COURT: Mr. Isham?

MR. ISHAM: May it please the Court, Ladies and Gentlemen of the Jury and opposing counsel. When Ms. Cromer gave her closing remarks to you yesterday, she labeled this case the calculator case. And that's a good label because I want you to remember in your minds when you make your decision that this case is about a stolen calculator. This case is not about the past. It's about a stolen calculator. You're going to be asked to assess punishment for Mr. Haley stealing a calculator. I ask that when you go back and do that, you let justice and fairness prevail. Thank you.

* * * * * * * *

[13]

Q. Also, Officer, let me direct your attention to State's Exhibit No. 6, which is there by your left arm. Officer, have you seen State's Exhibit 6 prior to this morning's hearing?

A. Yes, sir, I have.

Q. What is State's Exhibit No. 6, Officer?

A. This is what's called a pen packet. It's a packet of information from the penitentiary, information on the, on an inmate. Contains the charges, photograph and sentencing and also set of fingerprints.

Q. Have you had a chance to examine the fingerprints in State's Exhibit No. 6?

A. Yes, sir, I have.

Q. And were you able to compare the fingerprints in State's Exhibit No. 6 and State's Exhibit No. 3?

A. Yes, sir, I did.

Q. Were there sufficient points of comparison between State's Exhibit No. 6 and State's Exhibit No. 3 for you to make a, for you to give an opinion about whether or not the fingerprints in State's Exhibit No. 3 match those in State's Exhibit No. 6?

A. Yes, sir, there was.

Q. What is that opinion, Officer?

[14]

A. There's no doubt in my mind it's one in the same person.

Q. That the same person reflected in State's Exhibit No. 6, Michael Wayne Haley, is the same person you took fingerprints from in the courtroom?

A. Yes, sir.

MR. HARRIS: May I approach the witness, your Honor?

THE COURT: Yes, you may.

MR. HARRIS: At this time, Your Honor, I'll offer State's Exhibit No. 5 and No. 6 and tender to opposing counsel for any objections.

MR. ISHAM: No objections, Your Honor.

THE COURT: State's Exhibits 5 and 6, is that correct?

MR. HARRIS: Yes, Your Honor.

THE COURT: Those are both admitted.

* * * * * * * *

[17]

THE COURT: Back in Cause 7-80674-97.

State versus Michael Wayne Haley. Attorneys for both sides and the Defendant are present. We've got a charge prepared. One matter has arisen. We had not, had not had the State read the enhancement to, the two enhancement paragraphs that the State is pursuing and giving the Defendant a chance to enter a plea of not true to that because the law apparently makes it clear that, No. 1, these definitely do need to be read and then pursued by the State and, No. 2, that the State, I mean the Defendant,

needs to have an opportunity to state before the jury a plea of not true. And so, Mr. Haley, has your attorney mentioned that with you, discussed that with you?

MR. ISHAM: Yes.

THE COURT: Because I'm going to allow the State to reopen and to begin, or to read those two paragraphs that had not been read before. That's paragraph 3 and 4 of the indictment. They're not pursuing paragraph 5. And that would be paragraph 3 as amended in paragraph 4 with that abandoned word of **[18]** aggravated deleted. So I'm going to have them read that. If you do not wish to enter a plea of not true, then that will be fine and I would just, your attorney had indicated that you probably would not. Then I would not put any pressure or anything. I would just indicate to the jury that the State is required under the law to read the indictment not previously read that they're pursuing and leave it at that.

If you would like, however, to enter a plea, to be able to stand and enter a plea of not true to the prior enhancements, then I would give you a chance to do that. Whether you do or not, the charge we have, we took it from McClung's and adapted part of our own. There's just not a lot of good forms, but the forms I did find did not include any of the instruction on reasonable doubt, so that's been added to make sure the jury understands that the State has the burden. Whether you enter a plea or not, if they don't prove these beyond a reasonable doubt, then they're found not true anyway so let me ask you. You've already indicated that you've spent **[19]** some of this time talking with your attorney about it. But do you wish to enter a plea of not true before the jury or would you rather me not even ask for a plea at this point?

THE DEFENDANT: Leave, leave it like that.

THE COURT: Leave it like that so you don't have to enter a plea. Then I will leave it in that manner.

MR. ISHAM: You're not going to mention to the jury that he was given the opportunity?

THE COURT: No, not at all. I don't have to have them draw any inference. You were saying in chambers you didn't want him to have to enter the plea if he didn't want to and didn't want him to look bad if he didn't; and so, I will be careful to just indicate it just has to be read and not even indicate that. And with the charge being, or the plea being as it is with instructions on the State's burden of proof and proving beyond a reasonable doubt these prior matters, then it wouldn't matter that he entered a plea or not. They've still got to **[20]** prove beyond a reasonable doubt. If they don't, then they make a sentence of the state jail felony.

MR. HARRIS: I have abandoned the final paragraph of the indictment that makes reference to delivery of amphetamines, and we have included as enhancement to the instructions to the jury. I'm abandoning that. I'm not going to read it.

THE COURT: You'll read the third and the fourth paragraphs of the indictment?

MR. HARRIS: That's correct.

THE COURT: And we'll give you a chance to do that before the jury. You can go ahead and hang on to that and be ready when I call for it.

Now, with regard to the charge, both the State and the Defense, since this is a charge that we didn't find a lot of guidance on, both sides have made a number of corrections and suggestions and we've had to make modifications. So, with all the modifications that we've got in its final version, let me ask does the State have any objections then at this time to the charge, **[21]** the final draft of the charge?

MR. HARRIS: No, sir, no objections.

THE COURT: And then on behalf of the Defendant, Mr. Isham, do you have any objections to the charge as it is?

MR. ISHAM: Judge, I do have an objection to the language about parole. I know that it's required under our statute, but I'm still going to object to it based on the relevancy. I don't think the existence of parole is relevant to the determination of punishment in this case, and just want to voice my objection to that on the record.

THE COURT: You're talking specifically about the reference to the two to twenty, correct?

MR. ISHAM: Yes, sir, paragraph 4.

THE COURT: That last part of paragraph 4, the last sentence there, has to do with the state jail. I would assume you're not objecting to that?

MR ISHAM: That's correct.

THE COURT: But just to the rest of it?

MR. ISHAM: Yes, sir.

THE COURT: That objection is noted and **[22]** denied. Anything else?

MR. ISHAM: No, Your Honor.

MR. ISHAM [sic]: All right. Then would you bring the jury in, please.

(The jury enters the courtroom.)

THE COURT: All right. Please be seated. The record will reflect the jury has all returned in Cause 7-80674-97. State State [sic] of Texas versus Michael Wayne Haley. Attorneys for both the State and the Defendant are present, as is the Defendant. * * *

[23]

At this time before we read the charge, though, there is something that I had not insured was done and that was my fault and that is that the law requires that any enhancement paragraphs that are alleged and are being pursued by the State must be read before the jury. I was supposed to have the State stand up when we started the sentencing phase and have them read the part of the indictment that's being pursued that was not read earlier in the case. So, at this time before I read you the charge, I need to ask the State to read the portion of the indictment that was not previously read that's pursued in this case. If you would just direct that to the jury.

MR. HARRIS: In the State of Texas versus Michael Wayne Haley. This is the second half of this indictment. And the grand jurors aforesaid do further present that prior to the commission of the primary offense by the said Michael Wayne Haley, to wit, on the 9th day of September 1992 in the **[24]** 7th Judicial District Court of Smith

County Texas being Cause No. 7-91-1086 the said Michael Wayne Haley was convicted of a felony offense of robbery and said conviction became final to the commission prior to the commission of the primary offense. And the Grand Jurors aforesaid do further present that prior to the commission of each offense set out above by the said Michael Wayne Haley, to wit, on the 18th day of October 1991 in the 241st Judicial District Court of Smith County, Texas in Cause No. 1-89-671, the said Michael Wayne Haley was convicted of a felony offense of delivery of amphetamine and said conviction became final prior to the commission of each of the offenses set out above.

THE COURT: Okay. Thank you. Ladies and Gentlemen, as you've been told at the start of the case about the burden of proof, and I read that in the prior charge, and it will be in this charge, that the burden of proof is still on the State. It never shifts to the Defendant and so each allegation that the State makes in the **[25]** indictment the elements in the indictment, it must be proved beyond a reasonable doubt. You've already found that to be the case with regard to paragraph 1 and 2, but that's why I had to have paragraphs 3 and 4 read here in court. So you understand those are things that you must be satisfied beyond a reasonable doubt.

Now, Ladies and Gentlemen, I will read you the charge in this case, and I think it can be difficult to follow because of the reference to different allegations, so please try to stay with me if you can, if you will. I know you can. Just please do. (The charge of the court was read to the jury).

THE COURT: That's the charge, and we're now ready for closing arguments, and the State may begin whenever you're ready. You want the podium?

MS. CROMER: Yes. May it please the Court. Mr. Isham, you, Ladies and Gentlemen of the Jury. On behalf of the State of Texas, we thank you for your verdict yesterday and want to remind you that today is the most important part of the trial. We **[26]** want to continue to urge you to take in consideration your oath to follow the law.

Yesterday you thought you were dealing with a petty thief. Today you know you're dealing with a career criminal. When has this man exhibited during this phase of the trial – you know very little about this Defendant, but you do know that he is a career criminal and that is what can be considered when you're considering your punishment verdict. You can take into consideration not only the facts and circumstances that surround the offense, but you can take into consideration the type of person that you are dealing with. And the type of person that you are dealing with today has, is a young man who is a thief, who is a robber, who is a drug seller, a drug user and a menace to this community.

You are dealing with a person who has already been to the penitentiary on two occasions, and you are dealing with a person who has continued to violate the terms, the laws and continued [sic] offend and to reoffend while he was on parole for the offense of **[27]** robbery. I would just ask you when you are making your determination for sentencing to bear in mind that your sentencing verdict will take into consideration those three reasons why we impose sentences on individuals and that is to deter future

criminals from committing the same acts, to rehabilitate the present offender and for punishment sake. I would ask you that this particular person, you have heard no evidence in this phase of the trial for any reason of why this Defendant should not be punished for this crime. You have only heard evidence that he is a drug user, a drug seller, a robber and a thief, a felony thief.

The State has proven its burden that we had in this phase of the trial. At the beginning, at the first phase of the trial, we had to prove to you the jurisdiction that he had been convicted of two prior thefts. It didn't matter what he stole or anything like that. We just had to prove that he had two prior thefts so he could be convicted of a felony theft. At this phase of the trial what we have had to prove is that he had been **[28]** previously convicted of two prior felonies and that enhances his punishment, the range of punishment up to 20 years in the Texas Department of Corrections.

Now, if you found that the State did not prove that he had been convicted of the delivery of the amphetamines in the robbery, then he would be sentenced according to the laws of the state jail felony, which is a fourth degree felony and that would be anywhere from 180 days to two years in the state jail felony probated for up to five years, at which it would be an option.

But we are not asking you to consider that because we believe based on the evidence that has been admitted in this court; namely, this packet, this penitentiary packet here which bears the Defendant's photograph and his fingerprints which James Cooper indicated to you were the same fingerprints as the rolled impression that were taken yesterday prior to court, that the Defendant was one in the

same person that has been convicted previously of two felonies. Here is the proof right here, Ladies and Gentlemen. This **[29]** document which you can feel is under seal, is an official court document. You heard testimony saying that he is the same man who you know had previously been convicted of two felonies. You know that. You can tell by figuring the mathematics in your head that if he was convicted in 1992 of delivery, excuse me, of robbery and he was given a sentence of 10 years and he was convicted in 1991 of delivery of amphetamine and was given the sentence of 12 years, then you know he must have been on parole when he reoffended, when he was in the Wal-Mart stealing the calculator.

You have simply heard no other evidence to indicate that there's any reason that would mitigate this Defendant's sentence, that there is any reason for sympathy or any reason why he would not be a person who should be recommitted to the Texas Department of Criminal Justice and that's what we're going to ask you to do.

We are asking you to resentence the Defendant to the Texas Department of Corrections or Criminal Justice Institutional **[30]** Division by finding that the enhancement paragraphs are true, that the Defendant has been twice before convicted of two felony offenses and that not only that, he has exhibited in his past a propensity to use drugs with his marijuana conviction that was admitted into evidence and brought before you, that he has had the two previous theft convictions. This man is not an old man.

What has he shown, what worth has he shown in his life other than that he is a career criminal? What evidence do you have before you to indicate that he has done anything to contribute to the good of society? He has had

two previous penitentiary sentences for a total of 22 years. He has taken no effort to conform his conduct to that of society. If you were to sentence him to a period of probation by finding a state jail felony, he would walk out of this courtroom with you. He does not deserve to do that. His conduct has brought him here today. His foolishness, his continuation to violate the laws of the State of Texas has forfeited his right to be a free **[31]** man. I know that it is a difficult thing to do when you go back there and you consider what you have to do in terms of taking somebody's liberty away from what I know the Defense counsel will argue amounts to the theft of a calculator but that is not what we're dealing with here. We are dealing with an individual who has been a career criminal.

It's individuals like you that you might have said before in your life or thought, you know, when you hear about sexual offenders who reoffend or career criminals who reoffend, when are they going to do something about these reoffending criminals? When are they going to protect us from people who have been to the penitentiary and get out and continue to violate the laws? Today, Ladies and Gentlemen, you might not realize it but you are that "they". You are the proponent of that equation that does something about crime. You are the component of this society who puts a stop to the reoffenders, the career criminals, the violators of the law. You stop it today by **[32]** your verdict. It's up to you to do it. The State has met its burden in this phase of the trial and proven to you the Defendant has twice before been convicted of a felony and that today he needs to go back to the penitentiary. Do not feel bad when you are imposing this sentence because he will be with individuals who are just like himself, people who have not contributed to society, people who have

continued to violate the laws and people who belong in the penitentiary. His conduct deserves it, and we are asking you to sentence him to a term of 18 years in the Texas Department Criminal Justice Institutional Division.

THE COURT: Thank you, Ms. Cromer.

Mr. Isham, you ready?

MR. ISHAM: May it please the Court, Ladies and Gentlemen of the Jury and the opposing counsel. It's real easy to, given the circumstances today, as Ms. Cromer has done, to call Mr. Haley a career criminal, a thief and whatever other types of adjectives she used to describe him; but what's not easy is your job right now and that's to go **[33]** back in the jury room and figure out what is a fair punishment for Mr. Haley.

As I mentioned before, she called, Ms. Cromer, called this the calculator case. That's what this is. It's about a calculator, something probably similar to this that Mr. Haley stole, as you found, from Wal-Mart.

As a former police officer, I've arrested a lot of people. I've arrested people at that very Wal-Mart store. One of the questions I had in my mind as I did my job as a cop was, why do people do the things they do. I arrested an elderly lady in Wal-Mart for shoplifting. I went back to the same room that Mr. Haley was taken to and when I, when I was about to put handcuffs on this lady, as our police policy made us do, we looked in her purse and she had $500 cash. I thought, why is this lady stealing from Wal-Mart?

Up in another part of town, I had the occasion of arresting a stock broker for possession of cocaine, crack cocaine, a stock broker in his Mercedes buying crack cocaine. **[34]** I thought again to myself, what is it that

these people do what they do? You know what I came to the conclusion? I came to the conclusion that we all have within us the potential of committing a crime. We all have that. Sort of the old saying, "but for the grace of God there go I."

As I quit the police department and became a lawyer, I've talked to a lot of people. I do a lot of criminal defense work and something that I learned, that I've learned - - I keep learning it as an attorney - - is that the people that I talk to sometimes at the jail, sometimes in my office, I can always find something good that I like about them. I think that if you had a chance to sit down and talk with Mr. Haley, you would find something good you like about him, too.

But the real issue here, and I agree it's the most important part of the trial, is what is a fair punishment for Mr. Haley? What's fair? And we had some information in evidence about previous convictions, and even though he stole a calculator, it was a felony **[35]** offense. It was a felony offense because previous to this arrest at Wal-Mart, he wrote two hot checks. That's what made it a felony. If you remember Mr. Harris in some opening remarks, or I believe it may have been during voir dire, he could have stolen a candy bar one day and got caught and a candy bar the next day and got caught and a candy bar the next day and that would have been a felony.

Something that you'll notice when you look over the evidence is that all of these previous convictions, all of them, including the petty theft convictions, occurred within a three-year period and that there was a five-year gap between the time of his last conviction and the time of his arrest or now. I think that's important to assess

whether Mr. Haley is a career criminal. We talked about the range of punishment, and the State wants you to find true or find that they proved beyond a reasonable doubt both of the enhancement paragraphs. If you do that, then the range of punishment will be from two years to 20 years. Just so you'll have some **[36]** information to make your decision on, I'd like to sort of give you some other crimes, offenses that have that same punishment range.

MR. HARRIS: Your Honor, I'm going to object to that. That is completely irrelevant. We're sentencing this man for this particular offense, not for something else that may be in the penal code.

THE COURT: Sustained.

MR. ISHAM: Keep in mind that although you're going to have evidence of previous convictions, what Mr. Haley has been charged with, and you found him guilty of, is the felony theft of a calculator. I'm going to ask you to think about the calculator, the $59.87 calculator. When you go back and you decide what are you going to do with Mr. Haley? I'm going to ask that you let justice and fairness prevail. I want you to think about $59.87, a calculator. I know that you've been attentive through this whole process, and I know that you'll do the right thing when you reach your decision on what to do with Mr. Haley. Thank you.

[37]

THE COURT: Thank you, Mr. Isham. Mr. Harris?

MR. HARRIS: Thank you, Judge. Judge Gohmert, Mr. Isham, Ladies and Gentlemen of the Jury. Your job is just about done. The most important thing remains and that is to determine what kind [sic] type of punishment

this man is going to receive for the crime that he has committed.

Both my co-counsel and Mr. Isham have made some important points and I want to remind you just what you're doing here today. You are sentencing this man for committing a felony offense of theft, for he chose to steal a calculator. I know that perhaps sentencing someone to the penitentiary for stealing a calculator seems rather draconian and it seems rather severe; but in setting that penalty and determining what that penalty is, the law allows you to consider what kind of a man that is sitting over there next to Mr. Isham.

And what do we know, what kind of a man do we know that he is? Well, he's a drug dealer, twice convicted of being a drug **[38]** dealer. You can see that in the penitentiary packets that have been admitted as State's Exhibit No. 6. He's been to prison for dealing drugs. He's been convicted twice of doing that. What else do we know about him? We know he's a robber because also contained here in State's Exhibit No. 6 are the judgment and sentence where this man was sent to the penitentiary for robbing somebody. We know he's a thief because you found him guilty of being a thief, and we know that he's been twice before been [sic] convicted of being a thief, and we know that back in 1995 he was convicted of possessing marijuana. So, if you take a look at the big picture and you see what this man really is, he's much more than a thief. He is indeed a career criminal with convictions for dealing drugs, dealing drugs and robbing people and carrying marijuana and writing hot checks and writing hot checks and then stealing a calculator. He is a menace to our society.

It is true that he has not killed anybody. It's true that he's never robbed a bank, but does he really deserve any mercy or **[39]** any consideration from you because he has not been a violent criminal or because he hasn't done something more violent than just dealing drugs, when we know that's one of the root causes of problems in our society now is people like this man who deal drugs and steal and show flagrant contempt for the law of our society and our courts and our juries.

If Mr. Isham tells you it's not about the past, that could not be less true. It's a lot about his past because it tells you who he is. It tells you what kind of character he has. It tells you how he responds to being put in prison when society says you have done wrong for dealing with drugs and you've done wrong for robbing somebody, we're going to put you in the pentitiary [sic] for 22 years altogether.

Low and behold, less than three years after the last sentence, he's out there with marijuana. Less than five years after being convicted for robbery of methamphetamine, he's out there stealing stuff from the Wal-Mart. So, when you look at the big picture, when you look at the context of the **[40]** man who committed the offense, this is just not the theft of a calculator. This man is contributing to the downfall of our society by dealing drugs and by stealing, by carrying drugs and by robbing.

I know it's difficult the concept to put a man in prison for doing this kind of thing, but where else does he belong? He doesn't deserve probation. He's been to prison and it didn't do any good. He deals drugs. He possesses drugs. He robs people. He needs to be put in a cage where we'd put any other animal that so flagrantly violates the laws of our society and causes so much harm to our society is in a cage

where he belongs. Unfortunately, the only cages we have at our disposal are the Texas Department of Criminal Justice, at one of the many prisons in Texas that we keep building to house people like this man over here. He needs to go to prison. He needs to be put in a cage, and he needs to be kept away from the law-abiding citizens of this county for as long as the law will allow and that's what we're asking you to do here today.

[41]

It's true that we haven't heard anything good about him today. I wish there was some redeeming quality about him. There's not. There's nothing good that can be said about him except that that jury did what the law allowed and put this man away so he doesn't go out there and deal drugs to our children or steal from our stores. He just needs to go away where we never see him again. You can do that for up to twenty years and that may be the best thing that we can ever say about him is the good thing that y'all did and that is put him in prison and put him in prison for at least eighteen years, and I'd consider even more time than that because he deserves to go away. He deserves to be put in a cage.

THE COURT: Thank you, Mr. Harris. All right, Ladies and Gentlemen, you've now heard all the evidence of the case. You've heard the charge in this part of the trial. You've heard the arguments of counsel and so when you get back in the jury room, the Bailiff will put the exhibits that have been admitted back there with you. You'll have **[42]** pen and pad. You'll have the Charge of the Court here and once you're there, the Bailiff's out, all that's been done; and I have ordered lunch so you'll be able to eat during the deliberations. Some judges sometimes

say the thing to do is starve a verdict out of the jury. It makes them come to a conclusion quicker, and we don't do that. That's not just and it's not fair, so that will be there. If you need something else, you can send a note signed by the presiding juror indicating what that is. If you will step down, return to the jury room and begin deliberations.

(The jury exits the courtroom.)

THE COURT: All right. The jury has left the courtroom. If you'll just make sure that we know where you are if you go to eat lunch. Eat close here around the square so we can call and get you back, if necessary. All right. We will stand in recess.

(A short recess was taken.)

THE COURT: Then back in Cause 7-80674-97. Defense attorney didn't come in **[43]** yet? Mr. Isham is here. Court will come to order. We are in 7-80674-97. State versus Michael Wayne Haley. We've received a note from the presiding juror. Since the parties are all present. Please bring in the jury. Please be seated. The record will reflect the jury has all returned. The attorneys for both sides are now present. The attorney, the Defendant himself is present. Ladies and Gentlemen, I've received a note saying that we've reached a verdict, is that correct?

PRESIDING JUROR: Yes, sir.

THE COURT: All right. If you would hand that to the Bailiff to be presented to me. Thank you.

If the Defendant and his attorney will please rise. We, the jury, having found the Defendant Michael Wayne Haley guilty of the offense of theft, a state jail felony, as alleged in paragraphs 1 and 2 of the indictment, further

find that the allegations in paragraphs 3 and 4 of the indictment herein are true and that the Defendant is the same person, who prior to the commission of **[44]** the offense of felony theft, had been convicted of the offense of felony robbery in Cause No. 7-9110-86 in the 7th Judicial District Court in Smith County, Texas on the 9th day of September 1992. And we further find that prior to the commission of the offense of felony robbery, the Defendant had been convicted of the felony offense of delivery of amphetamine in Cause Nos. 189671 in the 241st Judicial District Court in Smith County, Texas on the 18th day of October 1991. And we assess his punishment and imprisonment in the Institutional Division of the Texas Department of Criminal Justice for a term of 16 years 6 months and a fine of none. That's signed by the presiding juror. Was that in fact your verdict as I've read it?

PRESIDING JUROR: Yes, sir.

THE COURT: And was it unanimous?

PRESIDING JUROR: Yes, sir.

THE COURT: Thank you. You may be seated. Is there anything further from the State then in this matter?

MR. HARRIS: No, Your Honor.

[45]

THE COURT: Anything further from the Defense?

MR. ISHAM: Nothing further, Judge.

THE COURT: Then, Ladies and Gentlemen of the Jury, you are about to be discharged of your responsibilities as jurors. You have found out, if you haven't served on a jury before, just how difficult the job of judge can be, because

that's what you've been. As I told you before the case started, you're the judges without the black robes, and I think you have, it's shown that you've worked hard to try to sort through the issues and face the difficult job and you've done it well, and we thank you for your efforts.

At this time when you step down, you'll be going back in the jury room. Make sure that the Bailiff gets the juror badges back. If you need something to take back with you for your own records or for your place of business or work, you can get that from the District Clerk's office. Some places, a business like to have them file marked and time stamped from the District Clerk, and **[46]** they can provide that. If there's any problem, you can come to my office and we will see that you get what you need. You've been diligent. You've been here when you were supposed to be doing what you were needing to do. I thank you very much. * * * **[47]** You are discharged as jurors.

* * * * * * * *

VOL 102 PAGE 765

[FILED MARY MORRIS
COUNT Y CLERK
95 NOV 17 PM 4:09
SMITH COUNTY, TEXAS
BY /s/ DENICE BLACK]
DEPUTY

[State's Exhibit 5]

CAUSE NO. 117,801

THE STATE OF TEXAS	§	**IN THE COUNTY COURT**
VS.	§	**AT LAW OF**
Michael Wayne Haley	§	**SMITH COUNTY, TEXAS**

JUDGEMENT OF PLEA OF GUILTY MISDEMEANOR

ON THIS the 2nd day of November, 1995, the above styled cause was called for trial, and both parties appeared and announced ready for trial, the State of Texas by and through its Criminal District Attorney of Smith County, Texas and the Defendant Michael Wayne Haley, appearing with/~~without~~ his/~~her~~ attorney; and the said defendant, after being duly admonished the consequences therefore by the Court pleaded ~~GUILTY~~/NO CONTEST to the Information herein, and waived a trial by jury and submitted his/~~her~~ cause to the Court; and it plainly appearing to the Court that said defendant is sane and that he/~~she~~ is not influenced in making said plea by any consideration of fear, or by persuasion of delusive hope of pardon prompting him/~~her~~ to confess his/her guilty and said plea being received by the Court and now entered in the minutes of the Court as the Defendant's plea herein, and evidence having been heard by the Court, and the

Court finding the defendant guilty as charged in the Information herein:

IT IS CONSIDERED AND ADJUDGED by the Court that the defendant is guilty of the offense of Possession of Marihuana a misdemeanor as charged in the Information herein and his/~~her~~ punishment is assessed at $ -0- dollars fine and 150 days SCJ day(s)/~~year~~(s) confinement, in the County Jail with Credit for time served.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED BY THE COURT, that the State of Texas do have and recover of the defendant Michael Wayne Haley the said fine of $ -0- dollars and all cost of his prosecution, and the said defendant be confined in the County Jail for said term of 150 days SCJ day(s)/~~year~~(s), with credit for time served; and that the said defendant be remanded to jail to await the further orders of the Court herein,

And execution my issue against the property of said defendant for the amount of said fine and court costs.

SIGNED THIS 17th DAY OF November, 1995.

RIGHT INDEX FINGER

/s/ Diane Devasto
DIANE DEVASTO, Judge
County Court at Law
Smith County, Texas

A CERTIFIED COPY

Attest 9 - 10, 1997
MARY MORRIS, County Clerk
Smith County, Texas
By /s/ Barbara Nix Deputy

[Seal] Barbara Nix

VOL 102 PAGE 766

**[FILED MARY MORRIS
COUNTY CLERK
95 NOV 17 PM 4:09
SMITH COUNTY, TEXAS
BY /s/ DENICE BLACK
DEPUTY]**

[State's Exhibit 5 continued]

Cause No. 117,801

THE STATE OF TEXAS § IN THE COUNTY COURT

VS. § AT LAW OF

Michael Wayne Haley § SMITH COUNTY, TEXAS

SENTENCE

THIS THE 2nd day of November, 1995, the above styled cause was again called for the purpose of having the Sentence of law pronounced against the defendant herein, in accordance with the verdict and judgment heretofore rendered and entered against said defendant in this cause before this Court, and upon such call the State of Texas appeared by its Assistant Criminal District Attorney of Smith County, Texas, and the said defendant appeared in open Court with/~~without~~ an attorney.

THEREUPON, the court asked whether there was anything the said defendant had to say why sentence should not then be pronounced against said defendant, and said defendant answered nothing in bar thereof.

WHEREUPON the Court proceeded, in the presence of said Defendant to pronounce sentence, as follows, to-wit: "It is the order of the Court that the Defendant Michael Wayne Haley who has been adjudged to be

guilty of the offense of Possession of Marihuana a misdemeanor, as charged in the Information in this cause, and whose punishment has been assessed at a fine of $ -0- dollars, and 150 days SCJ day(s)~~year~~(s) confinement in the Smith County Jail with credit for time served and court costs in this cause accrued, be delivered to the Sheriff of Smith County, Texas and by him/~~her~~ confined in the Smith County Jail until punishment assessed against the said defendant, as aforesaid, together with said costs, shall have been paid and satisfied, in accordance with the provision of the law governing confinement and payment and satisfaction of this sentence."

SIGNED THIS 17th DAY OF November, 1995.

RIGHT INDEX FINGER
[Thumb Print]

/s/ Diane Devasto
DIANE DEVASTO, Judge
County Court of Law
Smith County, Texas

[State's Exhibit 6]

THE STATE OF TEXAS

COUNTY OF WALKER

I, S. O. WOODS JR. HEREBY CERTIFY THAT I AM THE Record Clerk of the Texas Department of Criminal Justice-Institutional Division, a penal institution of the State of Texas, situated in the County and State aforesaid. That in my legal Custody as such officer are the original files and records of persons heretofore committed to said institution: that the (XX) photograph (XX) fingerprints and (XX commitments, including judgment and sentence, of HALEY, MICHAEL TDCJ/BPP # 628909 CAUSE# 1-89-671, 1-89-672 & 7-91-1086 a person heretofore committed to said penal institution and who served a term of imprisonment therein: that I have compared the attached copies with their respective original now on file in my office and each thereof contains, and is a full, true, and correct transcript and copy from its said original.

IN WITNESS WHEREOF, I have hereunto set my hand seal this 20th day of AUGUST, 1997

/s/ SO Woods Jr, Record Clerk

CW

Seal
TDCJ-ID

The director shall certify under the seal of the institutional division the documents received under Subsections (a) and (c) of Article 42.09, Code of Criminal Procedure. A document certified under this subsection is

self-authenticated for the purposes of Rules 901 and 902, Texas Rules of Criminal Evidence.

Article 42.09, Section 8(b), as amended by S.B. 1067, Acts 1993, 73d Leg.

[State's Exhibit 6 continued]

[TDCJ Photograph of Habeas Petitioner Omitted]

[State's Exhibit 6 continued]

No. 7-91-1086

THE STATE OF TEXAS	§	IN THE 7TH DISTRICT
VS.	§	COURT OF
MICHAEL WAYNE HALEY	§	SMITH COUNTY, TEXAS

JUDGMENT ON PLEA OF GUILTY OR NOLO CONTENDERE BEFORE COURT

WAIVER OF JURY TRIAL

Judge Presiding: DAVID MOORE
Date of Judgment: 9/9/92
Attorney for State: REX THOMPSON
Attorney for Defendant: KURT NOELL
Offense Convicted of: ATTEMPTED ROBBERY
Degree: THIRD 29.02
Date of Offense Committed: Oct. 15, 1991
Charging Instrument: INDICTMENT
Plea: GUILTY
Terms of Plea Bargain: NA
Plea to Enhancement Paragraph(s): NA
Findings on Enhancement: NA
Findings on Use of Deadly Weapon: TRUE
Date Sentence Imposed: 9/9/92
Costs: 84.50
Punishment and Place of Confinement: (10) TEN YRS TDC
Date to Commence: 9/9/92
Time Credited: 330 days
Total Amount of Restitution: -0-
Concurrent Unless Otherwise Specified.

JUDGMENT

The Defendant having been indicted in the above entitled and numbered cause for the felony offense of attempted robbery and this cause being this day called, the State appeared by her assistant Criminal District Attorney REX THOMPSON, and the Defendant MICHAEL W. HALEY, appeared in person and his counsel KURT NOELL, also being present and both parties announced ready and the Defendant in person and in writing in open Court having waived his right of trial by jury, such waiver being with the consent and approval of the Court and now entered of record on the minutes of the Court and such waiver being with the consent and approval of the Criminal District Attorney of SMITH County, Texas, in writing, signed by him, and filed in the papers of this cause before Defendant entered his plea herein, the Defendant was duly arraigned and in open Court pleaded GUILTY to the charge contained in the indictment; thereupon the Defendant was admonished by the Court of the consequences of the said plea and the Defendant is mentally competent and that he is uninfluenced in making said plea by any consideration of fear, or by and persuasion, or delusive hope of pardon prompting him to confess his guilt, the said plea was accepted by the Court and is now entered of record as the pleas herein of the Defendant. The Defendant in open Court, in writing, having waived the reading of the indictment, the appearance, confrontation, and cross-examination of witnesses, and agreed that the evidence may be stipulated and consented to the introduction of testimony by affidavits, written statements of witnesses and other documentary evidence, and such waiver and consent having been approved by the Court in writing and

filed in the papers of the cause; Court having, heard the Defendant's waiver of the reading of the indictment, the Defendant's plea thereto, the evidence submitted, and the argument of counsel, is of the opinion from the evidence submitted that the Defendant is guilty as charged.

IT IS THEREFORE ADJUDGED BY THE COURT, that the said Defendant is guilty of the felony offense of ATTEMPTED ROBBERY as found by the Court, that the said Defendant committed said offense on the 15th day of OCTOBER, 1991, that the punishment is hereby assessed at (10) TEN YRS confinement in the Texas Department of Corrections, that the Defendant be punished in accordance with same and that the State of Texas do have and recover of the said Defendant all costs in this prosecution expended, for which execution will issue.

THEREUPON the said Defendant was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, and it appearing to the Court that the Defendant is mentally competent and understanding of the English language, the Court proceeded in the presence of said Defendant, his counsel also being present, to pronounce sentence against him, as follows:

IT IS THE ORDER OF THE COURT that said Defendant, who has been adjudged to be guilty of ATTEMPTED ROBBERY and whose punishment has been assessed by the Court at confinement in the Texas Department of Corrections for (10) TEN YRS, be delivered by the Sheriff of SMITH County, Texas, immediately, to the Director of the Texas Department of Corrections or other person legally authorized to receive such convicts and said Defendant shall be confined in said Texas

Department of Corrections for (10) TEN YRS in accordance with the provisions of the law governing the Texas Department of Corrections, and the Defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

It is further ADJUDGED and DECREED by this Court that the sentence pronounced herein shall begin this date, and that the Defendant is granted 330 days credit for time served in jail.

/s/ David Moore
Judge Presiding

Notice of Appeal: ___

9/9/92
Date Signed

AUTHENTIPRINT

22C/281A

THE STATE OF TEXAS **IN THE 114TH DISTRICT COURT**

VS 7-91-1086 **OF**

MICHAEL WAYNE HALEY **SMITH COUNTY, TEXAS**

CHARGE: Aggravated Robbery **ARTICLE:29.02**
CONTROL#: 9110-301

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURORS, duly selected, organized, sworn and impaneled as such in and for the County of Smith, State of Texas, at the July - December Term, 1991, of the 114th Judicial District Court for said County, a quorum thereof being present, upon their oaths present in and to said Court that on or about the 15th day of October, 1991, and anterior to the presentment of this Indictment, in the County and State aforesaid, MICHAEL WAYNE HALEY did then and there, intentionally and knowingly, while in the course of committing theft of property and with intent to obtain and maintain control of property, threaten an place MARGARET WORKS in fear of imminent bodily injury and death; and the said MICHAEL WAYNE HALEY did then and there use and exhibit a deadly weapon, to-wit: a claw hammer;

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/
Foreman of the Grand Jury

[State's Exhibit 6 continued]

No.1-89-671

THE STATE OF TEXAS § IN THE 241ST DISTRICT
VS. § COURT OF
MICHAEL HALEY § SMITH COUNTY, TEXAS

JUDGMENT ON PLEA OF GUILTY OR NOLO CONTENDERE BEFORE COURT WAIVER OF JURY TRIAL

Judge Presiding: JOE TUNNELL
Date of Judgment: OCTOBER 18, 1991
Attorney for State: CLIFTON ROBERSON
Attorney for Defendant: KURT NOELL
Offense Convicted of: DELIVERY OF A CONTROLLED SUBSTANCE (ACTUAL)
Degree: SECOND (2ND)
Date of Offense Committed: November 13, 1988
Charging Instrument: INDICTMENT
Plea: GUILTY 4476.15
Terms of Plea Bargain: OPEN
Plea to Enhancement Paragraph(s) NA
Findings on Enhancement: NA
Findings on Use of Deadly Weapon: NA
Date Sentence Imposed: OCTOBER 18, 1991
Costs: 82.50
Punishment and Place of Confinement: TWELVE (12) YEARS T.D.C.
Date to Commence: OCTOBER 18, 1991
Time Credited: 123 days
Total Amount of Restitution: NA
Concurrent Unless Otherwise Specified.

JUDGMENT

The Defendant having been indicted in the above entitled and numbered cause for the felony offense of

DELIVERY OF A CONTROLLED SUBSTANCE (ACTUAL)

and this cause being this day called, the State appeared by her assistant Criminal District Attorney CLIFTON ROBERSON, and the Defendant MICHAEL HALEY, appeared in person and his counsel KURT NOELL, also being present and both parties announced ready and the Defendant in person and in writing in open Court having waived his right of trial by jury, such waiver being with the consent and approval of the Court and now entered of record on the minutes of the Court and such waiver being with the consent and approval of the Criminal District Attorney of SMITH County, Texas, in writing, signed by him, and filed in the papers of this cause before Defendant entered his plea herein, the Defendant was duly arraigned and in open Court pleaded GUILTY to the charge contained in the indictment; thereupon the Defendant was admonished by the Court of the consequences of the said plea and the Defendant is mentally competent and that he is uninfluenced in making said plea by any consideration of fear, or by and persuasion, or delusive hope of pardon prompting him to confess his guilt, the said plea was accepted by the Court and is now entered of record as the pleas herein of the Defendant. The Defendant in open Court, in writing, having waived the reading of the indictment, the appearance, confrontation, and cross-examination of witnesses, and agreed that the evidence may be stipulated and consented to the introduction of testimony by affidavits, written statements of witnesses and other documentary evidence, and such waiver and consent having been approved by the Court in writing and filed in the papers of the cause; Court having, heard the Defendant's waiver of the reading of the indictment, the Defendant's plea thereto, the evidence submitted, and the

argument of counsel, is of the opinion from the evidence submitted that the Defendant is guilty as charged.

IT IS THEREFORE ADJUDGED BY THE COURT, that the said Defendant is guilty of the felony offense of DELIVERY OF A CONTROLLED SUBSTANCE (ACTUAL) as found by the Court, that the said Defendant committed said offense on the 13th day of November, 1988, that the punishment is hereby assessed at TWELVE (12) YEARS confinement in the Texas Department of Corrections, that the Defendant be punished in accordance with same and that the State of Texas do have and recover of the said Defendant all costs in this prosecution expended, for which execution will issue.

THEREUPON the said Defendant was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, and it appearing to the Court that the Defendant is mentally competent and understanding of the English language, the Court proceeded in the presence of said Defendant, his counsel also being present, to pronounce sentence against him, as follows:

IT IS THE ORDER OF THE COURT that said Defendant, who has been adjudged to be guilty of DELIVERY OF A CONTROLLED SUBSTANCE (ACTUAL) and whose punishment has been assessed by the Court at confinement in the Texas Department of Corrections for TWELVE (12) YEARS, be delivered by the Sheriff of SMITH County, Texas, immediately, to the Director of the Texas Department of Corrections or other person legally authorized to receive such convicts and said Defendant shall be confined in said Texas Department of Corrections for TWELVE (12) YEARS in accordance with

the provisions of the law governing the Texas Department of Corrections, and the Defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

It is further ADJUDGED and DECREED by this Court that the sentence pronounced herein shall begin this date, and that the Defendant is granted 123 days credit for time served in jail.

/s/ Joe Tunnell
Judge Presiding

Notice of Appeal: NA

10-18-91
Date Signed

AUTHENTIPRINT

RIGHT INDEX FINGER

[State's Exhibit 6 continued]

INDICTMENT

THE STATE OF TEXAS **IN THE 241ST DISTRICT COURT**

VS 1-89-671

MICHAEL HALEY **OF**

SMITH COUNTY, TEXAS

CHARGE: Delivery of a Controlled Substance (Actual
ARTICLE: 4476-15; 4.03 (a); (F1) CONTROL#: 8906-256

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURORS, duly selected, organized, sworn and impaneled as such in and for the County of Smith, State of Texas, at the January - June Term, 1989, of the 241st Judicial District Court for said County, a quorum thereof being present, upon their oaths present in and to said Court that on or about the 13th day of November, 1988, and anterior to the presentment of this Indictment, in the County and State aforesaid, MICHAEL HALEY did then and there, knowingly and deliver to BOBBY STARK a controlled substance to-wit: Amphetamine, in the amount of less than twenty-eight (28) grams by aggregate weight including any adulterants and dilutants, by the actual transfer of the said controlled substance from MICHAEL HALEY to BOBBY STARK;

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/
Foreman of the Grand Jury

* * * [Unnecessary Pages Omitted]

[FILED
OCT 29 1997
R. BRAD BURGER
Clerk 7th Jud. Dist. Court
Smith Co.,Tx
By /s/ Deputy]

CAUSE NUMBER 007-80674-97

THE STATE OF TEXAS § IN THE 7TH JUDICIAL

VS. § DISTRICT COURT OF

MICHAEL WAYNE HALEY § SMITH COUNTY, TEXAS

LADIES AND GENTLEMEN OF THE JURY:

By your verdict returned in this case you have found the Defendant guilty of the offense charged in the indictment, namely, felony *Theft* which was alleged to have been committed on or about 9th day of April, 1997, in Smith County, Texas. This offense is a state jail felony.

1.

The indictment alleges in Paragraphs III & IV that prior to the commission of the offense of *Theft* for which you returned a verdict herein, the defendant was two times duly and legally convicted of a felony, namely, *Robbery* in the 7th Judicial District Court of Smith County, Texas, in Cause Number 7-91-1086, styled "The State of Texas v. MICHAEL WAYNE HALEY" on the 9th day of September, 1992; and *Delivery of Amphetamine* in the 241st Judicial District Court of Smith County, Texas, in Cause Number 1-89-671, styled "The State of Texas v. MICHAEL WAYNE HALEY" on the 18th day of October, 1991. To these allegations the defendant has pleaded "Not True."

2.

Now, if you find from the evidence beyond a reasonable doubt that prior to the commission of the offense of *Theft*, of which you have found the Defendant guilty, he was two times duly and legally convicted of a felony, to wit:

a. felony *Delivery of Amphetamine*, in Cause Number 1-89-671, styled "The State of Texas v. MICHAEL WAYNE HALEY," in the 241st Judicial District Court of Smith County, Texas, on the 18th day of October, 1991, and

b. felony *Robbery*, in Cause Number 7-91-1086, styled "The State of Texas v. MICHAEL WAYNE HALEY," in the 7th Judicial District Court of Smith County, Texas, on the 9th day of September, 1992;

And that the conviction, if any, for the felony of *Delivery of Amphetamine* in Cause Number 1-89-671 in 1991 in Smith County, Texas, aforesaid, occurred and became final prior to the commission of the offense of felony *Robbery* for which defendant was convicted, if he was, in Cause Number 7-91-1086 in 1992;

And that the judgments of conviction in Cause Number 1-89-671 and Cause Number 7-91-1086, if any, became final prior to the commission of the offense of felony *Theft*, of which you have found defendant guilty, and the defendant is the same person who was so convicted in Cause Number 1-89-671 and Cause Number 7-91-1086 aforesaid;

Then in such event, you will find the allegations are "True" and so state your verdict in the form provided for that purpose attached to this charge, and you will assess

the punishment at imprisonment in the Institutional Division of the Texas Department of Criminal Justice for any term of not more than twenty (20) years nor less than two (2) years; and in addition to imprisonment you may in your discretion, assess a fine against the Defendant in any amount not to exceed $10,000.

3.

If you find from the evidence that the Defendant was not convicted of both felony *Delivery of Amphetamine and Robbery*, if any, alleged in Paragraphs III & IV of the indictment prior to the commission of the offense of *Theft*, or if you have a reasonable doubt thereof, then you will complete the proper Verdict Form and you will assess Defendant's punishment, in such event, only for the offense of *Theft*, and without considering any offense alleged in Paragraphs III & IV of the indictment. In such case, you will assess Defendant's punishment at imprisonment in the state jail for any term not more than two (2) years nor less than 180 days; and, in addition, the jury may, in its discretion, assess punishment of a fine against the Defendant not to exceed $10,000. In that event, and in that event only, you may recommend that his sentence be probated which matter of whether you do or do not recommend a probated sentence rests within the sound discretion of the Jury. If you recommend probation, you will state in your verdict the number of years probationary period which you recommend. Any such probationary period recommended by you can in no event be less than two (2) years nor more than five (5) years and need not necessarily be of the same number of years as the number of years confinement assessed by you. You will also state in your verdict whether you do or do not recommend that the Defendant's fine be probated.

4.

Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment of not more than twenty (20) years nor less than two (2) years in the Institutional Division of the Texas Department of Criminal Justice, he will not become eligible for parole until the actual time served equals one-fourth of the sentence imposed, without consideration of any good conduct time he may earn. Eligibility for parole does not guarantee that parole will be granted.

It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.

You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

You are not to discuss among yourselves how long the accused would be required to serve the sentence that you impose. Such matters come within the exclusive jurisdiction of the Board of Pardons and Paroles division of the Texas Department of Criminal Justice and the Governor of the State of Texas, and must not be considered by you.

In the event the Defendant is sentenced to a period of incarceration in the State Jail Facility of not more thant [sic] two (2) years nor less that one-hundred eighty (180)

days and such sentence is not probated, the Defendant will not earn "good time" credit and will not be eligible for parole.

5.

The burden of proof in all criminal cases rests upon the State throughout the trial and never shifts to the defendant.

The prosecution has the burden of proving all of the allegations in the indictment including the alleged prior convictions, and it must do so by proving each and every element alleged beyond a reasonable doubt and if it fails to do so, you must find that allegation "Not True."

It is not required that the prosecution prove each element beyond all possible doubt; it is required that the prosecution's proof excludes all "reasonable doubt" concerning the Defendant's alleged prior convictions.

A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his affairs.

Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

In the event you have a reasonable doubt as to whether or not the Defendant was previously convicted as alleged after considering all the evidence before you and these instructions, you will find one or both of the alleged prior convictions "Not True," and consider the Defendant's sentence within the range of punishment for a State Jail

felony of not more than two (2) years nor less than one-hundred eighty (180) days and a fine not to exceed $10,000, if any.

You are further instructed that in fixing the defendant's punishment, which you will show in your verdict, you may take into consideration all the facts shown by the evidence admitted before you in the full trial of this case and the law as submitted to you in this charge.

6.

Your verdict must be by a unanimous vote of all members of the jury. In arriving at the amount of punishment to be assessed, it will not be proper for you to fix the same by lot, chance, any system of averages, or any other method than by a full, fair, and free exercise of the opinion of the individual jurors, and you may not refer to nor discuss any matter not in evidence before you.

You are the exclusive judges of the facts proved, of the credibility of the witnesses and of the weight to be given their testimony, but you are bound to receive the law from the court, which has been given you.

No one has any authority to communicate with you except the officer who has you in charge. During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

7.

Two verdict forms are provided for your use, and only one verdict may be returned by the jury; the presiding

juror will fill in the appropriate verdict form to conform with the jury's determination. The jury's verdict must be unanimously agreed to by all members of the jury, and only that verdict is to be signed by the presiding juror.

Signed this the 29th day of October, 1997.

/s/
LOUIS B. GOHMERT, JR.,
Judge, 7th Judicial District Court
Smith County, Texas

[FILED
OCT 29 1997
R. BRAD BURGER
Clerk 7th Jud. Dist. Court
Smith Co.,Tx
By /s/ Deputy]

CAUSE NUMBER 007-80674-97

THE STATE OF TEXAS § IN THE 7TH JUDICIAL
VS. § DISTRICT COURT OF
MICHAEL WAYNE HALEY § SMITH COUNTY, TEXAS

LADIES AND GENTLEMEN OF THE JURY:

In answer to your question, the jury may assess punishment at any term, whether days, months or years, so long as the term is not less than the minimum nor more than the maximum punishment for the offense.

It is not permissible for you under any circumstances in fixing the penalty to decide the same by lot, or by quotient. It sometimes happens that when jurors are unable to agree as to the punishment to be assessed, they decide that each juror shall set down the penalty which in his judgment the punishment should be, all of which to be added together and the sum total to be divided by twelve, and the quotient so ascertained by that division to constitute the verdict of the jury. Deciding a case by lot, or reaching a quotient, **is not permissible**, and you are instructed in this case that you must not consider any proposition of this character, but the punishment to be assessed must be determined and agreed upon by each juror on the facts of the case, as testified to by the witnesses, and the law as given you in the Charge by the Court.

/s/
LOUIS B. GOHMERT, JR.
Presiding Judge, 7th Judicial District
Court of Smith County, Texas
v.xp.568

[FILED
OCT 29 1997
R. BRAD BURGER
Clerk 7th Jud. Dist. Court
Smith Co.,Tx
By /s/ Deputy]

CAUSE NUMBER 007-80674-97

THE STATE OF TEXAS	**§ IN THE 7TH JUDICIAL**
VS.	**§ DISTRICT COURT OF**
MICHAEL WAYNE HALEY	**§ SMITH COUNTY, TEXAS**

VERDICT FORM

We the jury having found the Defendant, MICHAEL WAYNE HALEY, guilty of the offense of *Theft* a state jail felony as alleged in Paragraphs I & II, of the indictment, further find that the allegations in Paragraphs III & IV of the indictment herein are **"True"** and that the Defendant is the same person who, prior to the commission of the offense of felony *Theft*, had been convicted of the offense of felony *Robbery* in Cause Number 7-91-1086 in the 7th Judicial District Court in Smith County, Texas, on the 9th day of September, 1992, and we further find that prior to the commission of the offense of felony *Robbery* the Defendant had been convicted of the felony offense of *Delivery of Amphetamine* in Cause Number 1-89-671 in the 241st Judicial District Court in Smith County, Texas, on the 18th day of October, 1991, and we assess his punishment at imprisonment in the Institutional Division of the Texas Department of Criminal Justice for a term of 16 yrs. 6 mos. ~~years~~ (*a term of not over twenty (20) years nor less than two (2) years*) and a fine of NONE (*Answer*

"None" or in Dollars and cents, in the jury's discretion, not to exceed the sum of $10,000.00).

/s/ Diane Munn
PRESIDING JUROR

Verdict Returned 2:35 p.m.

Returned to Court 2:46 p.m.

No. 007-80674-97

THE STATE OF TEXAS	)(	IN THE 7th JUDICIAL
VS.	)(	DISTRICT COURT OF
Michael Wayne Haley	)(	SMITH COUNTY, TEXAS

JUDGMENT ON PLEA OF NOT GUILTY
BEFORE THE JURY
PENALTY BY THE JURY

Judge Presiding: Luis B. Gohmert, Jr
Date of Judgment: 10/29/97
Attorney for State: Kamala Cromer & Bill Harris
Attorney for Defendant: Herbert Isham
Offense Convicted of: Theft
Date Offense Committed: 04/09/97
Degree: State Jail Felony
Charging Instrument: Indictment
Plea: Guilty
Terms of Plea Bargain: N/A
State abandoned enhancement #5 and Amended #3.
Plea to Enhancement Paragraph(s): Not True
Findings on Enhancement: True
Findings of Use of Deadly Weapon: N/A
Date Sentence Imposed: 10/29/97 Costs:$ $146.50
Punishment and Place of Confinement: 16 years and 6 months TDCJ-ID
Date to Commence: 10/29/97
Time Credited:
Total Amount of Restitution: $ N/A
Concurrent Unless Otherwise Specified.

JUDGMENT

The Defendant having been indicted in the above entitled and numbered cause for the felony offense of Theft

and this day this cause being called for trial, the State appeared by her Assistant Criminal District Attorney,

Kamala Cromer & Bill Harris , and the Defendant, Michael Wayne Haley, appeared in person and his counsel, Herber [sic] Isham , also being present, and both parties announced ready for trial, the said Defendant in open Court was duly arraigned and pleaded NOT GUILTY to the charge contained in the indictment herein; thereupon a jury, to-wit: Diane Munn and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment read and the Defendant's plea of NOT GUILTY thereto, and having heard the evidence submitted, and having been duly charged by the Court, as to their duty to determine the guilt or innocence of the Defendant, and after hearing arguments of counsel, retired in charge of the proper officer to consider of their verdict, and afterward were brought into open Court, by the proper officer, the Defendant and his counsel being present, and in due form of law returned into open Court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court, to-wit:

WE THE JURY, find the Defendant, MICHAEL WAYNE HALEY, GUILTY of the felony offense of Theft as charged in the indictment.

/s/ Diane Munn

The Defendant having been found guilty by verdict of the jury and heretofore, at the time of entering his plea herein, having requested in writing that the jury assess the punishment herein, and further evidence being heard by the jury, the Court again charged the jury as provided by law, and the jury after hearing arguments of counsel, retired in charge of the proper officer to consider of their verdict and afterwards was brought into open Court by the proper officer, the Defendant and his counsel being present

and in due form of law returned into open Court the following verdict, which was received and accepted by the Court, and is here now entered upon the minutes of the Court, to-wit:

We, the jury having found the Defendant, MICHAEL WAYNE HALEY, guilty of the offense of Theft a state jail felony as alleged in Paragraphs I and II, of the indictment, further find that the allegations in Paragraphs III and IV of the indictment herein are "True" and that the Defendant is the same person who, prior to the commission of the offense of felony theft, had been convicted of the offense of felony Robber [sic] in Cause Number 7-91-1086 in the 7th Judicial District in Smith County, Texas on the 9th day of September, 1992, and we further find that prior to the commission of the offense of fely [sic] Robbery the Defendant had been convicted of the felony offense of Delivery of Amphetamine in Cause Number 1-89-671 in the 241st Judicial District Court in Smith County, Texas, on the 18th day of October, 1991, and we assess his punishment at imprisonment in the Institutional Division of the Texas Department of Criminal Justice for a term of 16 years and 6 months and a fine of None.

/s/ Diane Munn

IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court, that the said Defendant is guilty of the felony offense of Theft, and that the said Defendant committed said offense on the 9th day of April, 1997, as found by the jury, and that he be punished, as has been determined by the jury, by confinement in the Texas Department of Corrections for 16 years and 6 months , that the State of Texas do have and recover of said

Defendant all costs in this prosecution expended, for which execution will issue, and that said Defendant be sentenced in accordance with said assessment of punishment.

THEREUPON the said Defendant was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, and it appearing to the Court that the Defendant is mentally competent and understanding of the English language, the Court proceeding in the presence of the said Defendant, his counsel also being present, to pronounce sentence against him, as follows:

IT IS THE ORDER OF THE COURT that the said Defendant, who has been adjudged to be guilty of Theft

and whose punishment has been assessed by the verdict of the jury at confinement in the Texas Department of Corrections for 16 years & 6 months, be delivered by the Sheriff of Smith County, Texas, immediately, to the Director of the Texas Department of Corrections, or other person legally authorized to receive such convicts, and said Defendant shall be confined in said Texas Department of Corrections for 16 years and 6 months in accordance with the provisions of the law governing the Texas Department of Corrections of said State and the said Defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

IT IS FURTHER ADJUDGED AND DECREED by this Court that the sentence pronounced herein shall begin this date, and that the Defendant is granted credit for _____ days served.

/s/
JUDGE PRESIDING

Oct 30, 1997
DATE SIGNED

[RIGHT THUMB PRINT]

Notice of Appeal:_____

[Illegible File Stamp]

CAUSE NUMBER 007-80674-97

STATE OF TEXAS	**§ IN THE 7TH DISTRICT**
vs.	**§ COURT IN AND FOR**
MICHAEL WAYNE HALEY	**§ SMITH COUNTY, TEXAS**

MOTION TO WITHDRAW AS ATTORNEY OF RECORD

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes HERBERT B. ISHAM and moves to withdraw as attorney of record for Michael Wayne Haley in the above entitled and numbered cause, and for good cause shows the following:

I.

Due to a conflict of interest, the undersigned attorney requests to be allowed to withdraw from the appeal of this case.

WHEREFORE, PREMISES CONSIDERED, the undersigned requests permission to withdraw as counsel of record.

Respectfully submitted,

HOLCOMB & MORRISON
Law Offices
111 N. Spring Street
Tyler, TX 75702
903/597-5595
903/597-5596 FAX

By: /s/ Herbert B. Isham
HERBERT B. ISHAM

STATE BAR NO. 00796812
ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Motion to Withdraw as Attorney of Record was delivered to the District Attorney's Office, at 400 N. Broadway, Smith County Courthouse, Tyler, Texas 75702, on Nov 17th, 1997.

/s/ Herbert B. Isham
HERBERT B. ISHAM

NO. 007-80674-97

STATE OF TEXAS **§ IN THE 7TH DISTRICT**

vs. **§ COURT IN AND FOR**

MICHAEL WAYNE HALEY **§ SMITH COUNTY, TEXAS**

O R D E R

On Dec 22, 1997, came on to be considered the Motion to Withdraw as Attorney of Record in the above styled and numbered cause, and said motion is hereby

(GRANTED) ~~(DENIED)~~

/s/
JUDGE PRESIDING

V.A1
P. 590

Appellate Docket Number: 12-98-00045-CR

Appellate Case Style:

[FILED IN COURT OF APPEALS
12th Court of Appeals District
FEB 17 1998
TYLER, TEXAS
CATHY S. LUSK, CLERK]

DOCKETING STATEMENT (CRIMINAL)

12TH Court of Appeals

[to be filed in the court of appeals upon perfection of appeal under TRAP 32]

I. Parties (TRAP 32.2(a)):

Appellant (or Appellee, if State is appealing): Michael Wayne Haley	
Trial Attorney: Herbert B. Isham Appointed ☒ Retained ☐	Appellate Attorney: Herbert B. Isham Appointed ☒ Retained ☐

* * * * * * * * *

* * * [irrelevant information omitted]

/s/ Herbert B., Isham
Signature

In The

Court of Appeals

Sixth Appellate District of Texas at Texarkana

No. 06-98-00040-CR

MICHAEL WAYNE HALEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 7th Judicial District Court

Smith County, Texas

Trial Court No. 7-80674-97

Before Cornelius, C.J., Grant and Ross, JJ.

Opinion by Justice Grant

OPINION

Michael Haley was found guilty of felony theft by a jury. After finding two enhancement paragraphs in the indictment to be true, the jury assessed Haley's punishment at confinement for sixteen years and six months in the Institutional Division of the Texas Department of Criminal Justice.

Haley raises five points of error. In his first four points, he contends that constitutional errors occurred (1) when the trial court refused to grant Haley's pretrial motion to suppress evidence; (2) when the trial court failed to ask for Haley's plea to the enhancement paragraphs at the beginning of the punishment phase; (3) when the trial court improperly permitted the State to reopen during the punishment phase to read the enhancement paragraphs not previously read during the State's case in chief; and (4) when the trial court admitted photographs purporting to show the stolen merchandise. In his last point of error, Haley contends that the evidence was insufficient to support his conviction for felony theft as alleged in the indictment.

Chad Lanier, a loss prevention associate for Wal-Mart, testified that he observed Haley carrying a blue and white box, which Lanier believed contained a Texas Instruments calculator, down the back aisle of the store. Lanier testified that Haley turned his back to him and appeared to put the merchandise in the front of his pants. Haley then walked out of the store exit near the automotive department. Lanier then watched Haley get into a truck and drive around to the front of the store. Although Haley left the inside of the store, he remained on Wal-Mart property during the entire episode. Lanier never lost sight

of Haley. Haley then reentered the store through the front door carrying a blue and white box. Haley approached the service desk and was able to exchange the calculator for other merchandise. Lanier then approached Haley, identified himself as a loss prevention associate, and asked Haley to accompany him to the back of the store. Lanier took a photograph of the calculator in the blue and white box.

In his first point of error, Haley contends that the warrantless arrest was illegal because it did not fall within a statutory exception permitting a warrantless arrest and, therefore, the evidence obtained should have been suppressed. The trial court is the sole trier of fact at a suppression hearing, and this Court is not at liberty to disturb any finding that is supported by the record.[1] Specifically, Haley contends that the arrest was not made to prevent the consequences of theft under 18.16 of the Texas Code of Criminal Procedure.

Article 18.16 reads

Preventing Consequences of Theft

> All persons have a right to prevent the consequences of theft by seizing any personal property which has been stolen and bringing it, with the supposed offender, if he can be taken, before a magistrate for examination, or delivering the same to a peace officer for that purpose. To justify such seizure, there must, however, be reasonable ground to suppose the property to be stolen, and the seizure must be openly made and the proceedings had without delay.

TEX. CODE CRIM. PROC. ANN. art. 18.16 (Vernon 1977).

A store employee who witnesses someone commit the offense of theft of property from the store has the lawful right to arrest the offender under the authority of Article 18.16.[2] The legality of an arrest and seizure under this article depends upon whether the party making the arrest and seizure had a reasonable ground or probable cause to believe that the property seized had been stolen and the party arrested was the thief who had stolen the property.[3]

Haley contends that the arrest was not made to prevent the consequences of theft because Lanier allowed Haley to leave the store and because the returned merchandise cannot be proven to be the merchandise that was allegedly stolen. He also argues that there was no positive identification of the item before it left the store. Haley concludes his argument by stating that Lanier could not have arrested Haley to prevent the consequences of theft because there was no proof that theft occurred, since the supposed stolen merchandise was never positively identified.

Although Lanier did not have an opportunity to view, in great detail, the box that Haley carried out the door, he did get a general view of the box and testified Haley carried the same color box back into the front of the store that he had carried out of the store moments before

[1] *Green v. State*, 615 S.W.2d 700, 707 (Tex. Crim. App. [Panel Op.] 1980).

[2] *Simpson v. State*, 815 S.W.2d 900, 902 (Tex. App. – Fort Worth 1991, no pet.).

[3] *Douglas v. State*, 695 S.W.2d 817, 820 (Tex. App. – Waco 1985, pet. ref'd).

without paying for it. Haley never left the premises of the store. These facts provide strong circumstantial evidence that theft had occurred. The evidence was sufficient for the court to have found that Lanier had a reasonable ground and probable cause to believe that the property that Haley exchanged at the service desk had been stolen and that Lanier was acting under the authority conferred by statute to arrest Haley. Because the arrest was proper, the trial court did not err in admitting the evidence at trial.

The first point of error is overruled.

In his second and third points of error, Haley contends that error occurred when the trial court failed to ask Haley for his plea to the enhancement paragraphs at the beginning of the punishment stage of the trial and then allowed the State to reopen for purposes of reading the enhancement paragraphs.

The enhancement paragraphs were not read to the jury, at the beginning of the punishment phase, and Haley was not given an opportunity to plead to the enhancements. Each side made a brief opening statement. The State presented one witness who proved up pen packets from Haley's prior convictions, and the State then rested. Haley rested without cross-examining the State's witness or putting on any other evidence. The jury was then excused while the court prepared the charge. The trial court then realized that the enhancements had not been read to the jury as required by law, and Haley had not been given an opportunity to plead to them. Before bringing the jury back in and allowing the State to reopen to read the enhancements, the trial court asked Haley if he would like to enter a plea to the enhancements before

the jury. Haley stated that he did not want to enter a plea to the enhancements and that he did not want the trial court to tell the jury that he was given such an opportunity. The jury was then brought back in, and the enhancement paragraphs were read to them. No mention was made to the jury of either a plea by Haley or an opportunity to plead that he chose to forego. The State did not reoffer the witness testimony elicited during the punishment phase, nor did the defense stipulate to the evidence presented. Haley did not object to the reading of the enhancements or to the State's failure to reoffer the evidence.

The reading of the enhancement paragraphs during the punishment phase of the trial is mandatory.[4] However, error which results from not reading the enhancement paragraphs and not entering a plea can be cured at trial. Upon learning of the error, the indictment should be read to the jury, the accused should then enter a plea, and the State should reintroduce the evidence; or the parties may stipulate to the evidence.[5] In the instant case, any error by the trial court in not requiring the prior evidence to be reintroduced or by allowing the jury to consider the evidence presented before the reading of the enhancements was waived by Haley's failure to object on that ground.[6]

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[4] TEX. CODE CRIM. PROC. ANN art. 36.01 (Vernon Supp. 1999); *Turner v. State*, 897 S.W.2d 786 (Tex. Crim. App. 1995).

[5] *Warren v. State*, 693 S.W.2d 414, 416 (Tex. Crim. App. 1985).

[6] *See Ridge v. State*, 855 S.W.2d 234, 236 (Tex. App. – Fort Worth 1993, no pet.)(failure of defendant in narcotics prosecution to object to failure of state to reintroduce character testimony after reading enhancements and taking plea waived any error).

Additionally, any error by the trial court in failing to elicit a plea from Haley to the enhancements after the enhancements were read to the jury is waived under the invited error doctrine. "[T]he principle is that, if, during the progress of a cause, any party thereto request or move the court to make an erroneous ruling, and the court rule in accordance with such request or motion, he cannot take advantage of the error on appeal."[7] Even fundamental error is waived if it is invited by the appellant at trial.[8] Haley specifically requested that the trial court not ask him for a plea to the enhancements in front of the jury and also requested the trial court not to inform the jury that he had an opportunity to make a plea to the enhancements. Haley is estopped by the doctrine of invited error from raising this complaint on appeal.[9]

Points two and three are overruled.

In his fourth point of error, Haley contends that the trial court erred in admitting a photograph of the allegedly stolen merchandise, the Texas Instruments calculator.

Haley argues that the photograph was not relevant because there was no proof that the photograph was of the stolen merchandise.

A photograph of the allegedly stolen property is admissible under Article 38.34 of the TEX. CODE CRIM. PROC. which states

[7] *Gresham v. Harcourt*, 93 Tex. 149, 53 S.W. 1019, 1021 (1899).

[8] *Cadd v. State*, 587 S.W.2d 736, 741 (Tex. Crim. App. 1979).

[9] *Capistran v. State*, 759 S.W.2d 121, 124 (Tex. Crim. App. [Panel Op.] 1982).

Photographic Evidence in Theft Cases

(a) As used herein, the term "property" means tangible personal property offered for sale or lease by a person engaged in the business of selling goods or services to buyers.

(b) A photograph of property which a person is alleged to have unlawfully appropriated with the intent to deprive the owner of such property is admissible into evidence under the rules of law governing the admissibility of photographs and such photograph is as admissible in evidence as the property itself.

TEX. CODE CRIM. PROC. ANN. art. 38.34 (Vernon Supp. 1999).

Haley alleges that no witness could positively identify the property before it left the store. He further alleges that Lanier, the loss prevention associate, did not see Haley pick up the merchandise, could not read the label on the box until it was returned to the service desk, and could not see the calculator box while Haley was in his truck driving from the side of the store to the front. Lanier did testify he believed the color of the box Haley was carrying before he left the store was blue and white, the same color of the box which was returned to the service desk. As previously stated, Lanier testified that he watched Haley from the time he left the store until the time he returned, and therefore, he could make a reasonable inference that the content of the box was the same as when Haley left the store with it. He could also reasonably infer that the boxes on the shelves contained the products stated on the label.

We find that there was enough evidence to establish the probability that the calculator was stolen, which would

make it an appropriate item, relevant, and admissible in trial. Whether it was the item in question was ultimately a question for the jury as the fact finder.

The fourth point of error is overruled.

In his final point of error, Haley argues that the evidence was insufficient to support his conviction. Because Haley's argument is couched solely in terms of factual sufficiency, we will determine only the factual sufficiency of the evidence to support the conviction.[10]

In our review of the factual sufficiency of the evidence, we view all the evidence and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.[11] Examples of such a wrong and unjust verdict include instances in which the jury's finding is manifestly unjust, shocks the conscience, or clearly demonstrates bias.[12] If we find factual insufficiency, we vacate the conviction and remand for a new trial.[13]

Haley contends that the evidence was factually insufficient (1) because the stolen merchandise was never positively identified until it was brought to the service desk; (2) because Lanier and another Wal-Mart employee,

[10] Typically, when a general sufficiency challenge is made, we address both legal and factual sufficiency points. *See Lisai v. State*, 875 S.W.2d 35, 37 (Tex. App. – Texarkana 1994, pet. ref'd.). In the instant case, Haley made a general challenge to the sufficiency, but only cited the court to the standards of review used in a factual sufficiency challenge.

[11] *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996); *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996).

[12] *Clewis*, 922 S.W.2d at 135.

[13] *Jones*, 944 S.W.2d at 647; *Clewis*, 922 S.W.2d at 133-35.

Fabian Arteaga, gave inconsistent descriptions of Haley, each describing Haley in different clothing, and gave conflicting accounts of where Haley was when he allegedly concealed the merchandise; and (3) because Lanier gave conflicting answers in direct and cross-examination.

Conflicts in the evidence are to be resolved by the jury. The jury may accept one version of the facts and reject another, or reject any of a witness' testimony.[14] It is the jury's job to judge the credibility of the witnesses and the weight to be given their testimony, and it may resolve or reconcile conflicts in the testimony, accepting or rejecting such portions thereof as it sees fit.[15]

Based upon the evidence described earlier in this opinion, we find that the jury, as fact finder, was entitled to believe that Haley stole merchandise and then exchanged it at the service desk. The verdict is not so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust. The fifth point of error is overruled.

The judgment of the trial court is affirmed.

/s/
Ben Z. Grant
Justice

Date Submitted: December 9, 1998
Date Decided: January 12, 1999

Do Not Publish

[14] *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. [Panel Op.] 1981).

[15] *Banks v. State*, 510 S.W.2d 592, 595 (Tex. Crim. App. 1974).

[FILED IN
The Court of Appeals
Sixth District
JAN 12 1999
Texarkana, Texas
Tibby Hopkins, Clerk]

Court of Appeals
Sixth Appellate District of Texas

J U D G M E N T

Michael Wayne Haley,
Appellant

Appeal from the 7th Judicial District Court of Smith County, Texas (Tr. Ct. No. 7-80674-97). Opinion delivered by Justice Grant, Chief Justice Cornelius and Justice Ross participating.

No. 06-98-00040 V.

The State of Texas, Appellee

BE IT REMEMBERED, that in accordance with the Court's opinion of this date, the Court finds that there was no error in the judgment below. Therefore, it is **ORDERED** that the judgment of the court below is in all things **AFFIRMED**.

The Court, noting that appellant Michael Wayne Haley has filed his affidavit attesting to his inability to pay costs of appeal, hereby waives further payment of costs.

RENDERED JANUARY 12, 1999
BY ORDER OF THE COURT
WILLIAM J. CORNELIUS
CHIEF JUSTICE

ATTEST:
Tibby Hopkins, Clerk

[Illegible File Stamp]

NO. 007-80674-97

EX PARTE	§	IN THE 7TH JUDICIAL
	§	
MICHAEL WAYNE HALEY	§	DISTRICT COURT OF
	§	
	§	SMITH COUNTY, TEXAS

APPLICATION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, MICHAEL WAYNE HALEY, Applicant in the above styled cause and presents this Application for Writ of Habeas Corpus pursuant to Tex. Code Crim. Pro.Ann. art. 11.07. Applicant would show this court the following:

I.

CONFINEMENT AND RESTRAINT

Application [sic] is unlawfully confined and restrained of his liberty by Gary Johnson, acting in his official capacity as Director of the Texas Department of Criminal Justice - Inststutional [sic] Division, hereinafter referred to as TDCJ-ID, at the Michael Unit of the TDCJ-ID, pursuant to a judgement of conviction in cause number 007-80674-97 in the 7th Judicial District Court of Smith County, Texas, for the offense of theft. Punishment was assessed at 16 ½ years in TDCJ-ID.

Copies of the judgement and sentence are unavailable to the Applicant, but the originals are available to the court through the files of the Clerk.

II.

JURISDICTION

Applicant has not previously filed a writ application in this cause. Consequently, TEX. CODE CRIM. PRO. ANN. art. 11.07 Sec.4 should not apply.

Note: Applicant is a layman at the law unskilled and inexperienced in the drafting of writ, formal pleadings of errors, and application of the law in general, and therefore entitled to have his application held to a lesser stringent standard than those of a lawyer. See Haines vs. Kerner 92 S. Ct. 596

III.

GROUNDS FOR RELIEF

1) Court acted without jurisdiction by allowing misdemeanor to be enhanced beyond the scope of the statutes.

2) No evidence to support chronological order of enhancements.

3) No evidence presented to support increased level of punishment in State's claim of prior offense of robery [sic].

4) Impropper [sic] jury arguement.

5) Ineffective assistance of counsel.

a. Attorney never investigated State's contention on enhancements.

1) Attorney failed to object to State's reopening for purpose of reading the enhancement paragraphs; after the State closed it's case.

2) Attorney failed to object to State's failure to reoffer evidence.

3) Attorney failed to object to State allowing Defendant to not enter a plea to the enhancements.

4) Attorney gave erroneous advice when he advised Defendant to not enter a plea to the enhancements.

5) Attorney never investigated misdemeanor enhancements.

6) Attorney never objected to State using prior misdemeanor enhancements.

b. Attorney failed to file motion for discovery.

c. Attorney failed to conduct an independant investigation; had not interviewed State's witness.

d. Attorney failed to subpoena Wal-Mart video.

e. Improper jury argument.

III. [sic]

FACTS OF CASE

Applicant was arrested for the offense of theft and 2 prior theft convictions were used to enhance the theft to the level of state jail felony, Texas Penal Code § 31.03(e) art. (4)(D). Applicant was indicted by the Grand Jury for the County of Smith, State of Texas, at the January - June term of 1977. Further felony enhancements were added to the indictment. Applicant pleaded not guilty and was tried by jury in October of 1997. Applicant was found guilty and sentenced to 16 ½ years in TDCJ-ID. Applicant appealed. Appeal was affirmed and P.D.R. was denied. Applicant never enter a plea to the felony enhancement paragraphs.

Court records will clearly show that the enhancement paragraphs are not true.

IV. [sic]

ARGUMENTS

1) The court acted without jurisdiction. There is no statute which allows for the enhancement of a misdemeanor charge to any level above that of a state jail felony. Once a misdemeanor has been enhanced for punishment purposes to the level of a state jail felony, it does not become a felony for the purpose of enhancement to even higher levels of punishment. The offense remains a misdemeanor for all purposes except punishment. There is no statute which allows for further enhancement of a misdemeanor offense. Therefore, the trial court acted without jurisdiction when allowing the punishment range to be increased beyond the scope of that allowed by Texas Penal Code §12.43.

The court acting without jurisdiction, because no statute allows for the action taken by the trial court is a direct violation of the Applicant's Constitutional guarantee to a fair trial and due process of law as guaranteed by the 5th and 14th amendments.

2) No evidence was presented to support the chronological order of the enhancements. The indictment contains three felony enhancement paragraphs. The first felony enhancement paragraph concerns cause number 7-91-1086. Applicant was arrested for the charge on October 13, 1991; the date of the commission of this offense was October 12, 1991. The original charge in cause number 7-91-1086 was Aggrivated [sic] Robery [sic]; conviction was for **Attempted** Robery

[sic]. From the Date of arrest, October 13, 1991 until the date of conviction, September 9, 1992, Applicant was incarcerated.

Both the second and third felony enhancement paragraphs concern cause numbers 1-89-671 and 1-89-672. The conviction date on both these offenses is October 18, 1991. The enhancement paragraphs conclude as follows, "said conviction became final prior to the commission of the each offenses set out above." This is a false statement; which is clearly proven by court records. Copies of the records on these cause numbers are not available to the Applicant, but the originals are available to the Court through the files of the Clerk. A plea was never entered as to the enhancement paragraphs being true or not true.

The chronological order of convictions for enhancement purposes is an absolute requirement.

"An absolute requirement or prohibition may not be lawfully avoided, even with partisan consent." **Marin v. State 851 S.W.2d 275, 180**

"When State uses prior felony convictions for enhancement purposes, the following sequence has to occur. (1) the first conviction became final; (2) the offense leading to the later conviction was committed; (3) the later conviction became final, and (4) the present offense was committed." **Holt v. State 899 S.W.2d. 22,23,24.**

"State must prove that the date of the offense which led to the second felony conviction was subsequent to the date the first conviction became final." **McGee v. Estelle, 732 F2d. 447,449.**

"Where first prior offense did not become **"final"** until after date of commission of second prior offense, it was

improper to use both to enhance defendant's current punishment." **Holt v. State 899 S.W.2d.22.**

Chronology of prior felonies is an essential element of enhanced sentence statute. **French v. Estelle 692 F2d. 1021**

The Court allowing the State to use *not true* enhancement paragraphs to increase punishment level of present offense is a violation of Applicant's Constitutional right to a fair trial and due process of law, as guaranteed by the 5th Amendment, applied to the State through the 14th amendment. (See Exhibit A - Indictment)

3) No evidence was presented by the State to support the allegation of a prior conviction of robery [sic]. Applicant was arrested and indicted for aggrivated robery [sic], but *never* convicted for this offense. The indictment in the present offense of theft contains an enhancement paragraph which originally stated that the Applicant was convicted in cause number 7-91-1086, for the offense of aggrivated robery [sic]. The word aggrivated was scratched out, altering the charging indictment to read that the Applicant was convicted for the felony offense of robery [sic]. This was used to enhance the punishment range in the present offense of theft. Applicant has never been convicted of the offense of robery [sic]. This was used to enhance the punishment range in the present offense of theft. Applicant has never been convicted of the offense of robery [sic]. Therefore, there can be no evidence of this claim by the State.

Applicant was returned to Smith County on a bench warrant about April of 1993 for the purpose of having the affirmative finding removed in cause number 7-91-1086. A copy of this record is unavailable to the Applicant, but the

originals are available to the Court through the records of the Clerk.

If the State allows this misdemeanor which has now been enhanced to the level of state jail felony to be further enhanced from a state jail felony to a higher degree of punishment, the state must prove conviction of robery [sic]. There is no evidence to support this claim. The Applicant entered into a plea bargain agreement on the 9th day of September, 1992, in the 7th Judicial District Court of Smith County, Texas and was convicted of the offense of attempted robbery in cause number 7-91-1086. This enhancement paraghaph is not true. Therefore, this paragraph must be removed, and can not be used for the purpose of enhancement of punishment. A copy of the judgement and sentencing in cause number 7-91-1086 is unavailable to the applicant, but the original is available to the Court through the files of the Clerk. Applicant never entered a plea to the enhancement paragraphs.

"The term prior criminal record means a final conviction in a court of record." **Ex Parte Russel 738 S.W.2d. 644, 647**.

"State has the burden of proof as to allegations contained in enhancement paragraph of indictment, including burden to that the final conviction is a final conviction." **Skillern v. State 890 S.W.2d 849**

"State has burden of proof as to prior convictions alleged for enhancements of punishments, and standard of proof is beyond a reasonable doubt." **Williams v. State 899 S.W.2d 13**

The State using prior conviction of robbery for enhancement purposes, when enhancement paragraph is

not true violates Applicant's right to due process of law and his right to a fair trial. Allowing jury to assess punishment by using this not true enhancement paragraph violates the Applicant's right to a fair and impartial jury. (See Exhibit A - Indictment)

4) Improper jury argument. Error occured [sic] when State Attorney, during the punishment phase of the trial, made impropper [sic] jury argument.

"The approiate [sic] jury argument includes one or more of the following:

1) Summation of the evidence
2) Reasonable deduction of the evidence
3) Answer to opposing counsel's argument; and
4) A plea for law enforcement." **Cantu v. State 939 S.W.2d 627**.

In this case, during the punishment phase of the trial, the State's Attorney led the jury to believe that Applicant has been to prison twice. Applicant had only been to prison once, and by State Attorney leading the jury to believe the Applicant had been to prison twice injects harmful facts into evidence, which are in actuality not true.

Also in **Cantu supra**;

"jury argument must must [sic] be extreme or manifestlt [sic] improper, or inject new and harmful facts into evidence to constitute reversible error."

Allowing the jury to believe that Applicant has been to prison twice, when applicant has only been once is extreme, and manifestly improper. Jury assessed punishment thinking Applicant had been to prison twice.

Allowing jury to assess punishment thinking Applicant has been to prison twice was harmful.

Johnson v. State 604 S.W.2d. 128, 135. "This Court will not hesitate to reverse a judgement when the prosecuter [sic] engages in conduct calculated to deny the accused a fair and impartial trial."

An improper argument constitutes reversible error if in light of the record as a whole, it is extreme or manifestly improper, or if it injects new facts, harmful to the accused, into the trial proceedings or if it is violative of a mandatory statute. **Good v. State 723 SW2d 734 at 738**. (See Exhibits B, C, & D. S.O.F. Vol. 6)

5) Ineffective Assistance of Counsel.

The right to counsel plays a crucial role in the adversarial system embodied in the 6th amendment, since access to counsel's skills and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution," to which they are entitled. Because of the vital importance of the counsel's assistance, the courts have held that, with certain exceptions, a person accused of a federal, or state crime has the right to have counsel appointed if retained counsel cannot be obtained. That person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions the counsel's playing the role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to

ensure that the trial is fair. **Strickland v. Washington 104 S.Ct. 2063**

Strickland also sets forth the "two prong test." First, defendant must show that counsel's performance was deficient, requiring showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed defendant by the Sixth Amendment and, second, defendant must show that the deficient performance prejudiced the defence by showing that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable.

Since Applicant is alleging errors also in the sentencing part of the trial, Ex Parte Duffy sets forth the proper standard for ineffective assistance of counsel. See Ex Parte Duffy 607 S.W.2d. 507.

a) Counsel never investigated State's contention on enhancements **Ex Parte Lilly 656 S.W.2d. 490 at 493** the court held that: counsel was ineffective where he did not properly investigate the enhancement allegations.

Applicant was enhanced by two prior convictions improperly used. If counsel had investigated the enhancements, counsel would have found that the first conviction was not final before the second offense (robery [sic]) was committed, as required by law. **(Tx. Penal Code 12.42(a)(2) 1997).**

Applicant asked counsel if the state could use habitual criminal indictment, counsel aid that they could, without investigating the chronological order. Applicant's first conviction 'Delivery of a controlled substance' became final October 18, 1991. Applicant's second conviction was committed on or about October 12, 1991, several days

before the first conviction became final. State could not use both enhancement paragraphs to enhance applicant's punishment. Without the use of both enhancement paragraphs, State could not enhance a state jail felony to a second degree felony. See Tx. Penal Code 12.42 (a) (2) 1997.

In **Ex Parte Scott 581 S.W.2d. 181**, the court held that: counsel was ineffective for not discovering the first prior was not final when defendant committed second alleged prior conviction.

In **Ex Parte Felton 815 S.W.2d. 733 at 736**, the court held that: Applicant was denied effective assistance when his trial counsel failed to adequately investigate his prior conviction. This single error made at the punishment phase was of a magnitude significant enough to render applicant's counsel constitutionally ineffective.

In **Ex Parte Walker 777 S.W.2d 427 at 472**, the court stated: The failure of a defense counsel to make any effort to prevent the appellant's prior convictions from being admitted, this, as much as anything else, was a blatant example of counsel's deficient performance.

In the instant case, State used the alleged final conviction for robbery to enhance applicant's punishment. Applicant told counsel that he was never finally convicted of robbery.

In **Ex Parte Russell 738 S.W.2d. 644 at 647**: "the term prior criminal record means a final conviction in a court of record." Applicant plea bargained for the lesser offense of attempted robbery. Tx. Penal Code Art. 15.01 (d): an offense under this section is one category lower than the offense attempted.

Applicant would assert that under art. 15.01 (d) of the Tx. Penal Code, the offense of robbery is not the same as attempted robbery. Furthermore, applicant was returned on bench warrant to have the affirmative finding removed. Applicant told counsel he had never been convicted of robbery. Applicant's counsel failed to investigate. See Ex Parte Walker supra.

In **Ex Parte Duffy 607 S.W.2d 507 at 516** the court relied upon the decision in Powell v. Alabama, 53 S.Ct. 55 wherein the Supreme Court recognized that a thorough factual investigation is the foundation upon which effective assistance of counsel is built.

In Duffy supra at 516 it is well established by a line of cases that, ' a criminal defense lawyer must have a firm command of the facts of the case as well as governing laws before he can render reasonably effective assistance to his client - in or out of the courtroom. See **Flores v. State 756 S.W.2d. 632, 634; Herring v. Estelle 491 F.2d. 125, 128; Caraway v. Beto 421 F.2d 636, 637; Williams v. Beto 345 F2d 698, 705**.

In light of counsel's conduct in the instant case concerning counsel's failure to investigate the prior convictions used for enhancement against Applicant, there is no doubt that counsel not only did not have a firm command of the facts, but was also unaware of the governing laws pertaining to that situation.

By counsel's failure to make an effort to have the prior conviction of robbery removed, Applicant's sentence was founded on errors of a constitutional magnitude.

1) Attorney failed to object to State re-opening for purpose of reading the enhancements.

2) Attorney failed to object to States failure to re-offer evidence.

3) Attorney failed to object to State allowing defendant not to enter a plea to enhancements.

4) Attorney gave erroneous advice when he advised applicant not to enter a plea to the enhancements.

Issues 1-4 will be argued together-

In **Warren v. State, 693 SW 2d 414, 416** the defendant was convicted of felony theft, defendant received enhanced punishement after being found to have two prior convictions and defendant appealed.

Court of Criminal Appeals granted defendants Petition for Discretionary Review. The Court held that defendant "preserved" error resulting from not reading enhancement allegations of indictment to jury, and entering a plea where defendant filed motion for mistrial after jury was dismissed.

A mirror case as applicant's, except Warren's attorney objected and filed proper motions, where applicant's attorney failed to do so, causing applicant to be estopped by the "invited error" rule. Had applicant's attorney objected applicant would have been able to take advantage of error on appeal.

Looking at Warren it is clear that applicant's counsel's performance was deficient and the error was so serious as to deprive applicant of a fair trial.

Attorney never objected to States failure to re-offer evidence. In **Ridge v. State 855 SW 2d at 235**, the proper procedure to follow when the error in failing to read the indictment is discovered during trial is for the indictment

to be read to the jury, the accused to enter a plea to the indictment, and either for the State to re-introduce the evidence or for the parties to stipulate to the evidence.

In the instant case applicant's counsel failed to object, once again putting applicant under the invited error rule. Had applicant's counsel objected, applicant would have been able to take advantage of error on appeal, or at least cured the error at trial.

Applicant's counsel went even farther by erroneously advising applicant to not enter a plea, and not telling jury tht [sic] he was given such an opportunity.

In **Beasly v. US 491 F2d 687**, relief was granted where attorney advised client on a clear point of law.

Peltier v. State 626 SW 2d 30 att 31, reads:

Since these statutory provisions from the Old Code, authorities construing them, early and late, are plentiful. The essential point is that until the indictment is read and a plea is entered the issue is not joined between the State and the accused before the jury. The Court reviewed many prior cases that thus joijning [sic] issue is mandatory.

It also reads: It is of such a substantial nature that in all the decisions of court it has been treated and regarded as mandatory.

Since it is well established tht [sic] a plea is mandatory, there can be no defense strategy in advising applicant to not enter a plea.

5) Attorney never investigated misdemeanor enhancements

6) Attorney failed to object to State using uncounseled misdemeanor enhancements.

Issues 5 and 6 will be argued together.

The State used two misdemeanor theft by checks to enhance applicant. Applicant was sentenced on those theft by check charges without the assistance of counsel, and without any knowledge of the law.

Defendant whose attorney failed to investigate whether prior convictions used to enhanced defendant's sentence was assisted by counsel, was denied effective assistance of counsel.

Cook v. Lynaugh 821 F 2d 1072

Also attorney failed to object to State using uncounseled misdemeanor enhancements. Attorney should have objected in order to preserve this error.

b) Attorney failed to file motion for discovery.

c) Attorney failed to conduct an independent investigation:

had not interviewed State's witnesses.

d) Attorney failed to subpoena Wal-Mart video.

Issues b, c, and d will be argued together.

The Sixth Amendment guarantees criminal defendants reasonable assistance of counsel.

Applicant's counsel never filed a motion for discovery, never conducted an independent investigation, had not interviewed State's witnesses. If counsel would have filed proper motions, the motion to suppress that he did file would have been stronger.

Had Applicant's counsel conducted an independent investigation, counsel would have discovered that Applicant was never shown on video tape stealing anything, also counsel would have discovered that video tape only shows Applicant entering Wal-Mart once to return calculator, not twice as alleged by State's witnesses.

Had counsel interviewed the witnesses against Applicant, counsel would have known before the trial that witnesses were "putting the whole story together" and going on nothing more than assumptions. Counsel would have been able to raise serious doubt about Applicant ever being in the Wal-Mart store prior to returning the calculator.

Counsel failed to subpoena Wal-Mart video. Had counsel subpoenaed video from Wal-Mart, a video would have shown that Applicant never left the automotive exit, never got into a truck and drive to front of Wal-Mart and reenter. A video would have shown Applicant entering the front of Wal-Mart only once, with calculator already in his hands. A video would have proved Applicant's innocence. Wal-Mart has video cameras all over the store. Wal-Mart had the proof that Applicant needed to prove his innocence.

Not only did counsel failed to subpoena Wal-Mart video, Applicant asked counsel to subpoena the tapes, counsel told Applicant "it would not be necessary, it's the State that has the burden of proof."

The purpose of the Sixth Amendment is to insure that criminal defendants receive a fair trial. When an attorney refuses, or even fails to review and then subpoena a tape that could have cleared Applicant of the charges against

him, that is not providing Applicant ample opportunity to meet the case of the prosecution.

In **Ex Parte Raborn 658 S.W.2d. 605** the court held:

An essential element of the standard of effective assistance of counsel is to conduct an independant factual investigation.

Strictland v. Washington 104 S.Ct. 2077: Every defendant is entitled to a trial in which his interests are vigorously and consciently advocated by an able lawyer. A proceeding in which the defendant does not receive assistance in meeting the force of the State does not constitute due process.

Ex Parte Duffy 607 S.W.2d. 507, 518: It is well settled that an attorney has a professional duty to present all available evidence and arguments to support the defence of his client.

e) Attorney failed to object to improper jury argument.

As previously stated, State's attorney led jury to believe Applicant has been to prison twice. Applicant told counsel that he has only been once. Counsel told Applicant that it is better for the jury to think that Applicant got out of prison and committed another crime than to think that he was out on bond and committed another crime. At this point, any competant attorney would have entered an objection to the State's attorney's improper argument. By allowing jury to assess Applicant's punishment thinking that he had been to prison twice prejudiced the jury, and denied Applicant a fair trial.

(See Exhibits B, C, & D. S.O.F. Vol. 6)

PRAYER

Wherefore, Applicant prays that the Court, after expiration of the time within which the attorney representing the State may file his answer to conduct an evidentiary hearing, make findings of fact, and thereafter direct the Clerk to transmit the record thus developed to the Court of Criminal Appeals as required by art. 11.07 (d) V.A.C.C.P., for further action by that Court, granting relief to which applicant is entitled.

Respectfully submitted,

/s/

Michael Wayne Haley

VERIFICATION

I, Michael Wayne Haley, TDCJ-ID #821353, being presently encarcerated in the Michael Unit of the Texas Department of Criminal Justice - Institutional Division in Anderson County, Texas, declare under penalty of perjury that I am the Applicant in the above and foregoing Petition, and I have read said Petition and the factual allegations of the same are true and correct.

Executed on this the 18th day of Feb 2000.

/s/

Michael Wayne Haley

DECLARATION OF INABILITY TO PAY COST

(The following declaration is made pursuant to the Texas Rules of Civil Procedure and Title 6 Chapter 132 of the Civil Practices and Remedies Code.)

Now respectfully comes Michael Haley T.D.C.J.-I.D. #821353, and declares that I am unable to pay the cost in this Writ of Habeas Corpus and would show the Court the following:

(1) I am presently incarcerated in the Michael Unit of the Texas Department of Criminal Justice - Institutional Division where I am not permitted to earn of [sic] handle money.

(2) I have no source of income or spousal income.

(3) I currently have $00.00 credited to me in the Inmate Trust Fund.

(4) During my incarceration in the Texas Department of Criminal Justice Institutional Division I have received approximately $50.00 per month as gifts from relatives and friends.

(5) I neither own nor have an interest in any realty, bonds, or bank accounts, and I receive no interest or dividend income from any source.

(6) I have 0 dependents.

(7) I have total debts of approximately $ 00.00.

(8) I owe $ 00.00 as restitution.

(9) My monthly expenses are approximately $50.00.

I, Michael Haley T.D.C.J.-I.D. #821353, being presently incarcerated in the Michael Unit of the Texas Department of Criminal Justice - Institutional Division in Anderson County, Texas, verify and declare under penalty of perjury that the foregoing statements are true and correct.

Executed on this 18th day February 2000.

/s/ Michael Haley

Applicant

[FILED
BECKY DEMPSEY
DISTRICT CLERK
2000 May 15 PM 4:19
SMITH COUNTY, TEXAS
BY /s/
DEPUTY]

NO. 007-80674-97-A

EX PARTE	§	IN THE 7TH JUDICIAL
	§	
MICHAEL WAYNE HALEY	§	DISTRICT COURT OF
	§	
	§	SMITH COUNTY, TEXAS

RESPONSE TO APPLICATION FOR WRIT OF HABEAS CORPUS

Comes now the STATE OF TEXAS and makes this Response to Applicant, Michael Wayne Haley's Application for Writ of Habeas Corpus and would show the Court as follows:

I.

Applicant was found guilty by a jury and was sentenced in the 7th Judicial District Court to sixteen and one-half (16 ½) years confinement in the Institutional Division of the Texas Department of Criminal Justice for Theft, in cause number 07-80674-97.

II.

The State denies each and every claim that the Applicant presents.

III.

Applicant has five complaints. Applicant's first complaint is that the Court acted without jurisdiction by allowing a misdemeanor to be enhanced beyond the scope of the statutes. To enhance a theft charge the Defendant must have two prior theft convictions of any grade. The Applicant had a misdemeanor theft conviction on December 3, 1991, cause number 94,664 and on March 28, 1989, cause number 81, 358-A, Smith County, Texas. Applicant's second and third complaints are regarding the sufficiency of evidence to support the enhancements and the prior offense of robbery enhancement. The sufficiency of evidence can not be attacked through a Writ of Habeas Corpus where the Applicant has pled guilty. **Ex Parte Williams**, 703 S.W.2d 674 (Tex.Crim.App. 1986). The issue of sufficiency of evidence has already been affirmed on appeal. Applicant's fourth argument is that the jury argument was improper. It is the duty of the Applicant to present facts, not argument, which if true would entitle him to relief. **Ex parte Maldonado**, 688 S.W.2d 114 (Tex.Crim.App. 1985). Any contention which was raised and rejected on direct appeal or could have been, but was not raised on appeal will not be the basis for relief pursuant to Article 11.07. **Ex parte Chambers**, 612 S.W.2d 572 (Tex.Crim.App. 1981), **Ex parte Scheussler**, 846 S.W.2d 850, 852, n.6 (Tex.Crim.App. 1993), but see **Warren v. State**, 744 S.W.2d 614 (Tex.Crim.App. 1988) (suggesting ineffective counsel may be raised after appeal). Applicant's fifth complaint is that his counsel was ineffective. Applicant was not denied ineffective counsel however his attorney declined to provide an affidavit.

V.

THEREFORE, PREMISES CONSIDERED, the STATE OF TEXAS respectfully requests that Applicant's Application for Writ of Habeas Corpus be DENIED.

Respectfully submitted,

/s/
EDWARD J. MARTY, Assistant
Criminal District Attorney
403 Smith County Courthouse
Tyler, Texas 75702
903/535-0520
State Bar Number 13144765

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to Application for Writ of Habeas Corpus has been sent to Michael Haley, TDCJID #821353, Michael Unit, P.O. Box 4500, Tennessee Colony, Texas 75886, on this the 15th day of May, 2000.

/s/
EDWARD J. MARTY, Assistant
Criminal District Attorney

* * * [Irrelevant Page Omitted]

[FILED
BECKY DEMPSEY
DISTRICT CLERK
2000 May 25 PM 2:43
SMITH COUNTY, TEXAS
BY /s/
DEPUTY]

NO. 007-80674-97-A

EX PARTE	§	IN THE 7TH JUDICIAL
	§	
	§	DISTRICT COURT OF
	§	
MICHAEL WAYNE HALEY	§	SMITH COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Applicant, Michael Wayne Haley, was indicted in the 7th District Court of Smith County, Texas, for the offense of Theft on the 5th day of June, 1997. The case was called for trial on August 25, 1997, Judge presiding. The case proceeded to trial by jury. The applicant was found guilty and the jury assessed a penalty of 16 ½ years confinement in the Texas Department of Criminal Justice, Institutional Division. The case was appealed and the sixth Court of Appeals affirmed the decision in Cause No. 06-98-00040 - CR. The opinion was not published.

Findings of Fact

(1) Applicant complains that the theft was not enhanced according to the statute.

(2) Applicant has two misdemeanor theft convictions in Smith County, Texas.

(3) Applicant complains of the sufficiency of the evidence to support the enhancements and the prior offense of robbery enhancement.

(4) Applicant complains that his counsel was ineffective.

Conclusions of Law

(1) The indictment was enhanced correctly.

(2) The sufficiency of the evidence was raised on direct appeal and can not be attacked by a Writ of Habeas Corpus.

(3) Applicant counsel was not ineffective.

It is respectfully requested that the Application for Writ of Habeas Corpus be in all things DENIED.

SIGNED this the 25 day of May, 2000.

/s/
JUDGE PRESIDING

TEXAS COURT OF CRIMINAL APPEALS

APPLICANT MICHAEL WAYNE HALEY

APPLICATION NO. 45,796-01

APPLICATION FOR 11.07 WRIT OF HABEAS CORPUS

ACTION TAKEN

APPLICATION DENIED WITHOUT WRITTEN ORDER ON FINDINGS OF TRIAL COURT WITHOUT A HEARING.

/s/ SW Mansfield 6/21/2000
JUDGE DATE

[FILED-CLERK
U.S. DISTRICT COURT
00 AUG 24 AM 10:26
TEXAS-EASTERN
BY /s/]

PETITION FOR WRIT OF HABEAS CORPUS: 28 USC §2254 (Rev. 10/99)

IN THE UNITED STATES DISTRICT COURT

FOR THE Eastern DISTRICT OF TEXAS

Tyler Division

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Michael Wayne Haley	Michael Unit
PETITIONER	CURRENT PLACE OF CONFINEMENT
(Full name of Petitioner)	
vs.	821353
	PRISONER ID NUMBER
GARY JOHNSON	
RESPONDENT	

(Name of TDCJ Director, Warden, Jailor, or authorized person having custody of petitioner)

CASE NUMBER
(Supplied by the Clerk of the District Court)

INSTRUCTIONS - READ CAREFULLY

1. The petition must be legibly handwritten or typewritten, and signed by the petitioner, under penalty of perjury. Any false statement of an important fact may lead to prosecution for perjury. Answer all questions in the proper space on the form.

2. Additional pages are not allowed except in answer to questions 11 and 20. Do not cite legal authorities. Any additional arguments or facts you want to present must be in a separate memorandum.

3. When the Clerk of Court receives the $5.00 filing fee, the Clerk will file your petition if it is in proper order.

4. If you do not have the necessary filing fee, you may ask permission to proceed *in forma pauperis*. To proceed *in forma pauperis*, (1) you must sign the declaration provided with this petition to show that you cannot prepay the fees and costs, and (2) if you are confined in TDCJ-ID, you must send in a certified *In Forma Pauperis* Data Sheet from the institution in which you are confined. If you are in an institution other than TDCJ-ID, you must send in a certificate completed by an authorized officer at your institution certifying the amount of money you have on deposit at that institution. If you have access or have had access to enough funds to pay the filing fee, then you must pay the filing fee.

5. Only judgments entered by one court may be challenged in a single petition. If you want to challenge judgments entered by different courts, either in the same state or in different states, you must file separate petitions as to each court.

6. Include all your grounds for relief and all the facts that support each ground for relief in this petition.

7. When you have finished filling out the petition, mail the original and two copies to the Clerk of the United States District Court for the federal district within which the State court was held which convicted and sentenced you, or to the federal district in which you

are in custody. A "VENUE LIST," which lists U.S. District Courts in Texas, their divisions, and the addresses for the clerk's office for each division, is posted in your unit law library. You may use this list to decide where to mail your petition.

8. Petitions that do not meet these instructions may be returned to you.

PETITION

What are you challenging? (Check only one)

❑ A judgment of conviction or sentence, probation or deferred-adjudication probation (Answer Questions 1-4, 5-12 & 20-23)

❑ A parole revocation proceeding. (Answer Questions 1-4, 13-14, & 20-23)

❑ A disciplinary proceeding. (Answer Questions 1-4, 15-19 & 20-23)

All petitioners must answer questions 1-4:

1. Name and location of the court (district and county) which entered the conviction and sentence that you are presently serving or that is under attack:

   7th Judicial District Court Tyler (Smith County) Texas

2. Date of judgment of conviction: 10-29-97

3. Length of sentence: 16 years and 6 months T.D.C.J. - I.D.

4. Nature of offense and docket number (if known): Theft

_____

Judgment of Conviction or Sentence, Probation or Deferred - Adjudication Probation:

5. What was your plea? (Check one)

   ❑ Not Guilty ❑ Guilty ❑ Nolo contendere

6. Kind of trial: (Check one) ❑ Jury ❑ Judge Only

7. Did you testify at the trial? ❑ Yes ❑ No

8. Did you appeal the judgment of conviction? ❑ Yes ❑ No

9. If you did appeal, in what appellate court did you file your direct appeal?

   Sixth Appellate Court Cause Number (if known) 06-98-00040-CR What was the result of your direct appeal (affirmed, modified or reversed): affirmed

   What was the date of that decision? Jan. 12th 1999

   If you filed a petition for discretionary review after the decision of the court of appeals, answer the following:

   Result: Denied

   Date of result: 5-27-1999 Cause Number (if known): 06-98-00040-CR

   If you filed a petition for writ of certiorari with the United States Supreme Court, answer the following:

   Result: _____

   Date of result: _____

10. Other than a direct appeal, have you filed any petitions, applications or motions from this judgment in any court, state or federal? This includes any state application for writ of habeas corpus that you may have filed.

    ❑ Yes ❑ No

11. If your answer to 10 is "Yes," give the following information:

Name of court: 7th Judicial District Court of Smith County

Nature of proceeding: Application for Writ of Habeas Corpus

Cause number (if known): 007-80674-97-A

Date (month, day and year) you filed the petition, application or motion as shown by a file-stamped date from the particular court.

Feb. 24th 2000

Grounds raised: Court acted without jurisdiction, no evidence to support chronological order of enhancements, no evidence to support prior conviction of Robbery, Improper Jury argument and, Ineffective Assistance of counsel

Date of final decision: June 21st 2000

Name of Court that issued the final decision: Court of Criminal Appeals of Texas

As to any ***second*** petition, application or motion, give the same information:

Name of Court: _____

Nature of Proceeding: _____

Date (month, day and year) you filed the petition, application or motion as shown by a file stamped date from the particular court.

_____

Grounds raised: _____

_____

Date of final decision: _____

Name of court that issued the final decision: _____

If you have filed more than two petitions, applications, or motions, please attach an additional sheet of paper and give the same information about each petition, application, or motion.

12. Do you have any future sentence to serve after you finish serving the sentence you are attacking in this petition?

☐ Yes ☒ No

(a) If your answer is "yes," give the name and location of the court that imposed the sentence to be served in the future:

_____

(b) Give the date and length of the sentence to be served in the future: _____

(c) Have you filed, or do you intend to file, any petition attacking the judgement for the sentence you must serve in the future?

❑ Yes ❑ No

Parole Revocation:

13. Date and location of your parole revocation: _____

14. Have you filed any petitions, applications, or motions in any state or federal court challenging your parole revocation?

❑ Yes ❑ No

If your answer is "yes," complete Question 11 above regarding your parole revocation.

Disciplinary Proceedings:

15. For your original conviction, was there a finding that you used or exhibited a deadly weapon? ❑ Yes ❑ No

16. Are you eligible for mandatory supervised release?

❑ Yes ❑ No

17. Name and location of prison or TDCJ Unit that found you guilty of the disciplinary violation:

_____

Disciplinary case number: _____

18. Date you were found guilty of the disciplinary violation:

_____

Did you lose previously earned good-time credits?

❑ Yes ❑ No

Identify all punishment imposed, including the length of any punishment if applicable, any changes in custody status, and the number of earned good-time credits lost: _____

_____

19 Did you appeal the finding of guilty through the prison or TDCJ grievance procedure?

❑ Yes ❑ No

If your answer to Question 19 is "yes," answer the following:

Step 1 Result: _____

Date of Result: _____

Step 2 Result _____

_____

Date of Result: _____

All applicants must answer the remaining questions:

(t) State clearly every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting them.

CAUTION:
Exhaustion of State Remedies: You must ordinarily present your arguments to the highest state court as to each ground before you can proceed in federal court. Subsequent Petitions: If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

Following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement is a separate ground for possible relief. You may raise any grounds, even if not listed below, if you have exhausted your state court remedies. However, you should raise in this petition all available grounds

(relating to this conviction) on which you base your belief that you are being held unlawfully.

DO NOT JUST CHECK ONE OR MORE OF THE LISTED GROUNDS. Instead, you must also STATE the SUPPORTING FACTS for ANY ground you rely upon as the basis for your petition.

(a) Conviction obtained by a plea of guilty which was unlawfully induced, or not made voluntarily, or made

without an understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by the use of a coerced confession.

(c) Conviction obtained by the use of evidence gained from an unconstitutional search and seizure.

(d) Conviction obtained by the use of evidence obtained from an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the prosecution's failure to tell the defendant about evidence favorable to the defendant.

(g) Conviction obtained by the action of a grand or petit jury which was unconstitutionally selected and impaneled.

(h) Conviction obtained by a violation of the protection against double jeopardy.

(i) Denial of effective assistance of counsel.

(j) Denial of the right to appeal.

(k) Violation of my right to due process in a disciplinary action taken by prison officials.

A. **GROUND ONE**: No evidence to support chronological order of enhancements.

Supporting FACTS (tell your story briefly without citing cases or law): Petitioner was enhanced by two felony enhancements Cause number 7-91-1086 and Cause number 1-89-671 State presented no evidence that Cause number 1-89-671 was a final conviction befor [sic] Cause number 7-91-1086 was committed. Denying Petitioner a fair trial.

B. **GROUND TWO**: No evidence to support States claim of robbery

Supporting FACTS (tell your story briefly without citing cases or law):

Petitioner was enhanced by felony enhancement of robbery State presented no evidence to support that Petitioner was convicted of robbery. Petitioner has never been convicted of the offence of robbery, therefore there can be no evidence of this claim by the State.

C. **GROUND THREE**: Impropper [sic] Jury Argument

Supporting FACTS (tell your story briefly without citing Cases or law):

States Attorney led jury to believe that Petitioner has been to prison twice. Petitioner has only been to prison once. See Exhibit A Statement of Facts included in Brief in Support

D. **Ground Four:** Ineffective Assistance of Counsel.

Supporting FACTS (tell your story briefly without citing cases or law): Petitioners Counsel was ineffective for not discovering the enhancements were not true, not objecting to State's Attorney's impropper [sic] jury argument. Erroneously advising petitioner to not enter a plea to enhancements. (See Brief in support)

21. Have you previously filed a federal habeas petition attacking the same conviction, parole revocation, or disciplinary proceeding that you are attacking in this petition?

☐ Yes ☒ No

If your answer is "yes," give the date on which each petition was filed, the federal court in which it was filed, and whether the petition was (a) dismissed without prejudice or (b) denied.

22. Are any of the grounds listed in paragraph 20 above presented for the first time in this petition?

☐ Yes ☒ No

If your answer is "yes," state briefly what grounds are presented for the first time and give your reasons for not presenting them to any other court, either state or federal.

23. Do you have any habeas corpus proceedings or appeals now pending in any court, either state or federal, relating to the judgment or proceeding under attack?

☐ Yes ☒ No

If "yes," identify each type of proceeding that is pending (i.e., direct appeal, art. 11.07 application, or federal habeas petition), the court in which each proceeding is pending, and the date each proceeding was filed.

Wherefore, petitioner prays that the Court grant him the relief to which he may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on Aug 16th 2000 (month, date, year).

Executed on Aug 16th 2000 (date).

/s/ Michael Haley
Signature of Petitioner (required)

Petitioner's current address: Michael Haley # 821353
P.O. Box 4500
Tenn. Colony, Texas 75886

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

MICHAEL WAYNE HALEY -Petitioner-	§	
v.	§	Civil Action No. ___
GARY L. Johnson, Director Texas Department of Criminal Justice-Institutional Division, -Respondent-	§	

PETITIONER'S WRIT OF HABEAS CORPUS
WITH BRIEF IN SUPPORT
(28 U.S.C. § 2254)

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Michael Wayne Haley, Petitioner in the above entitled and numbered cause, files this his application for Writ of Habeas Corpus pursuant to 28 U.S.C. Sections 2241 and 2254, in which he challenges the legality of his conviction and sentence for the offense of Theft.

In support of said application Petitioner would show this Court as follows:

I.

STATEMENT OF THE CASE

Petitioner was arrested for the offense of Theft and two prior theft convictions were used to enhance the theft to the level of State Jail Felony.

Petitioner was indicted by the grand jury for the County of Smith, State of Texas at the January - June term of 1997.

Further, felony enhancements were added to the indictment. Petitioner pleaded not guilty and he was tried by jury in Oct. 1997. Petitioner was found guilty by jury and sentenced to 16 ½ years in T.D.C.J.-I.D. Petitioner never entered a plea to the felony enhancements paragraphs. Court records will show that the enhancement paragraphs are not true.

GROUNDS FOR RELIEF

1) No evidence tc support chronological order of enhancements.

2) No evidence present to support State's claim of prior conviction of Robbery.

3) Improper Jury Argument

4) Ineffective Assistance of Counsel:

   1) Attorney never investigated State's contention on enhancements.

   2) Attorney failed to object to State re-opening for purpose of reading the enhancement paragraphs.

   3) Attorney failed to object to State's failure to reoffer evidence.

   4) Attorney failed to object to State allowing Petitioner to not enter a plea to the enhancements.

   5) Attorney gave erroneous advise when he advised Petitioner to not enter a plea to the enhancements.

   6) Attorney failed to object to improper jury arguement.

   7) Attorney failed to file motion for discovery.

8) Attorney failed to conduct an independent investigation; had not interviewed State's witnesses.

9) Attorney failed to subpoena Wal-Mart video.

ARGUMENTS

1) No evidence was presented to support the chronological order of the enhancements. - Petitioner was enhanced by two prior felony convictions. The first felony enhancement paragraph concerns cause no. 7-91-1086. The second felony enhancement paragraph concerns cause no. 1-89-671. The enhancement paragraphs conclude as follows, "said conviction became final [prior] to the commission of each of the offenses set out above." This is a false statement. The first felony enhancement paragraph Attempted Robbery was committed on or about Oct. 12, 1991. The second felony enhancement paragraph Delivery of a Controlled Substance became final October 18, 1991, several days after the first offense was committed. A plea was never entered as to the enhancement paragraphs being true or not true. There can be no evidence that the first prior offense was final prior to the commission of the second.

[State must prove that the date of the offense which led to the second felony conviction became final. McGee v. Estelle, 732 F.2d 447, 449].

[Chronology of prior felonies is an essential element of enhanced sentence statue..] By the State using not true enhancement paragraphs to increase punishment level of present offense is a violation of Petitioner's Constitutional right to a fair trial and Due Process of Law, as guaranteed by the 5th. Amendment. See French v. Estelle, 692 F.2d 1021.

2) No evidence presented to support State's claim of prior conviction of Robbery. - The indictment in the present offense of theft contains an enhancement paragraph that was amended to say petitioner was convicted of the offense of robbery. This was used to enhance the punishment range in the present offense. Petitioner has *never* been convicted of the offense of Robbery, Therefore, there can be no evidence of this claim by the State.

Petitioner entered into a plea bargain agreement on the 9th. day of September, 1992, in the 7th. Judicial District Court of Smith County, Texas, and was convicted of the offense of Attempted Robbery. [Tex. Penal Code 15.01 (d): provides: an offense under this section is one catergory lower than the offense attempted.]

By the State using prior conviction of Robbery for enhancement purposes, when enhancement paragraph is not true violates Petitioner's Right to Due Process of Law and his right to a fair trial.

3) Improper Jury Arguement - State's Attorney, during the punishment phrase of the trial led the jury to believe that Petitioner has been to prison twice. (See S.O.F. V. 6; pg. 6-line 23 & 24, pg. 23- line 1 & 2, pg. 25- line 24 & 25.) /s/ ATTACHED TO END OF BRIEF

Petitioner had only been to prison once. The only way the jury could have found the enhancement paragraphs true would be for them to believe that Petitioner had been to prison Twice.

Allowing the jury to believe that Petitioner has been to prison twice injects harmful facts into evidence, which are in actuality not true.

Allowing jury to assess punishment thinking Petitioner has been to prison twice, when Petitioner has only been once, prejudiced the jury and denied Petitioner a fair trial.

4) Ineffective Assistance of Counsel-

1) Counsel never investigated State's contention on enhancements. Petitioner was enhanced by two prior convictions improperly used. If Counsel had investigated the enhancements, Counsel would have found that the first conviction was not final before the second offense (Robbery) was committed, as required by law.

Petitioner asked Counsel if the State could use habitual criminal indictment, Counsel said that they could without investigating the chonological order.

Petitioner's first conviction, "Delivery of a Controlled Substance" became final Oct. 18th. 1991. Petitioner's second conviction was committed on or about Oct. 12th. 1991, several days before the first conviction became final. State could not use both enhancement paragraphs to enhance Petitioner's punishment. Without the use of both enhancement paragraphs, State could not enhance a State Jail Felony to a second degree felony.

Also in the instance [sic] case, State used the alleged final conviction for Robbery to enhance Petitioner's punishment. Petitioner told Counsel that he was never finally convicted of Robbery, Counsel told Petitioner it was the same thing.

Tex. Penal Code Art. 1501 (d): An offense under this section is one category lower than the offense attempted.

Petitioner would assert that under Art. 15.01 (d) of the Tex. Penal Code, the offense of Robbery is not the same as Attempted Robbery. Petitioner told counsel he had never been convicted of Robbery. Petitioner's counsel failed to investigate.

In Ex Parte Duffy, 607 S.W.2d 507 at 516. The Court relied upon the decision in Powell v. Alabama, 53 S.Ct. 55, wherein the Supreme Court recognized that a thorough factual investigation is the foundation upon which effective assistance of counsel is built.

In Duffy supra., at 516, it is well established by a line of cases that a criminal defense lawyer must have a firm command of the facts of the case as well as governing laws before he can render reasonably effective assistance to his client. See Herring v. Estelle, 491 F.2d 125, 128; Caraway v. Beto 421 F.2d 636, 637; Williams v. Beto, 345 F.2d 698, 705.

In light of Counsel's conduct in the instant case, concerning counsel's failure to investigate the prior convictions sued for enhancement against Petitioner, there is no doubt that counsel not only did not have a firm command of the facts, but was also unaware of the governing laws pertaining to that situation.

By Counsel's failure to make an effort to have the prior conviction of Robbery removed, Petitioner's sentence was founded on errors of a Constitutional magnitude.

2) Attorney failed to object to State re-opening for the purpose of reading the enhancement paragraphs.

3) Attorney failed to object to State's failure to reoffer evidence.

4) Attorney failed to object to State allowing Petitioner not to enter a plea to the enhancements.

5) Attorney gave erroneous advice when he advised Petitioner not to enter a plea to the enhancements.

Had Petitioner's Attorney made the proper objections to the above errors, petitioner would have been able to take advantage of the errors on appeal, or at least cure the errors at trial. By Attorney's failure to object to State allowing Petitioner not to enter a plea. Jury must have assumed Petitioner was not challenging the enhancements. Petitioner's Counsel went even farther by erroneously advising Petitioner to not enter a plea.

In Beasly v. U.S., 491 F.2d 687, relief was granted where attorney erroneously advised client on a clear point of law.

Peltier v. State, 626 S.W.2d 30 at 31 reads: Since these statutory provisions from the old code, authorities construing them, early and late, are plentiful. The essential point is that until the indictment is read and a plea is entered the issue is not joined between the State and the accused before the jury. The Court reviewed many prior cases that thus joining the issue is Mandatory.

It also reads: It is of such a substantial nature that in *all* the decisions of the court it has been treated and regarded as mandatory.

Since it is well established that a plea is mandatory, there can be no defense strategy in advising Petitioner to not enter a plea.

6) Attorney failed to object to Improper jury arguement.

As previously stated, State's Attorney led the jury to believe Petitioner has been to prison twice. Petitioner told counsel that he has only been once. Counsel told Petitioner that it is better for the jury to think that Petitioner got out of prison and committed another crime, than to think that he was out on bond and committed another crime.

At this point, any competant attorney would have entered an objection to the State's improper arguement.

By allowing the jury to assess Petitioner's punishment thinking that he had been to prison twice prejudiced the jury, and denied Petitioner to a fair trial. (See S.O.F. Vol. 6: pg. 6- line 23 & 24; pg. 23- line 1 & 2; pg. 25- line 24 & 25)

7) Attorney failed to file Motion for Discovery.

8) Attorney failed to conduct an independent investigation; had not interviewed State's witnesses.

9) Attorney failed to subpoena Wal-Mart video.

Petitioner's counsel never filed a Motion for Discovery, never conducted an independent investigation, never interviewed State's witnesses. If counsel would have filed proper motions, the motion to suppress that he did file would have been stronger.

Had Petitioner's counsel conducted an independant investigation, counsel would have discovered that Petitioner was never shown on video tape stealing anything, also counsel would have discovered that video tape only shows Petitioner entering Wal-Mart once to return calculator, not twice as alleged by State's witnesses.

Had counsel interviewed the witnesses against Petitioner, counsel would have known before the trial that witnesses were "putting the whole story together," and going on nothing more than assumptions. Counsel would have been able to raise serious doubt about Petitioner ever being in the Wal-Mart store prior to returning the calculator.

Counsel failed to subpoena Wal-Mart video. Had counsel subpoenaed video from Wal-Mart, a video would have shown that Petitioner never left the automatic exit, never got into a truck and drive to front of Wal-Mart and re-enter. A video would have shown Petitioner entering the front of Wal-Mart only once with calculator already in his hands. A video would have proved Petitioner's Innocence.

Not only did counsel fail to subpoena Wal-Mart video, Petitioner asked counsel to subpoena the tapes, counsel told Petitioner, "it would not be necessary, it's the State that has the burden of proof."

The purpose of the Sixth Amendment is to ensure that criminal defendants receive a fair trial. When an attorney refuses, or even fails to review and then subpoena a tape that could have cleared petitioner of the charges against him, that is not providing Petitioner ample opportunity to meet the case of the prosecution.

Strickland v. Washington, 104 S.Ct. 2077, Every defendant is entitled to a trial in which his interests are vigorously and consciently advocated by an able lawyer. A proceeding in which the defendant does not receive assistance in meeting the force of the State does not constitute due process.

Ex Parte Duffy 607 S.W. 2d. 507-518. It is well settled that an attorney has a professional duty to present all

available evidence and arguements to support the defence of his client.

PRAYER

Wherefore, based upon the individual, as well as the cumulative, effects of trial counsel's unprofessional errors, the Petitioner has sustained his entire burden under Strickland v. Washington. For these reasons, Petitioner respectfully prays that this Honorable Court will grant his application for Habeas Corpus Relief, and grant all other relief to which he may be entitled.

Respectfully Submitted,

/s/

Michael Wayne Haley -
Petitioner -Pro Se

VERIFICATION

I, Michael Wayne Haley, TDCJ-ID #821353, being presently encarcerated- in the Michael Unit of the Texas Department of Criminal Justice - Institutional Division in Anderson County, Texas, declare under penalty of perjury that I am the Applicant in the above and foregoing Petition, and I have read said Petition and the factual allegations of the same are true and correct.

Executed on this the 16th day of Aug 2000.

/s/

Michael Wayne Haley

* * * [Attachments Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

MICHAEL WAYNE HALEY	§	
Petitioner,	§	CIVIL ACTION NO.
	§	6:00 cv518
V.	§	Magistrate Judge
GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,	§	Judith K. Guthrie
Respondent.	§	

RESPONDENT JOHNSON'S ANSWER WITH BRIEF IN SUPPORT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Gary L. Johnson, Director, Texas Department of Criminal Justice, Institutional Division (TDCJ-ID), Respondent herein ("the Director") by and through his attorney, the Attorney General of Texas, and files this his Answer with Brief in Support.

I.

JURISDICTION

The court has jurisdiction over the subject matter and the parties pursuant to 28 U.S.C. §§ 2241, 2254.

II.

DENIAL

The Director denies each and every allegation of fact made by Petitioner ("Haley"), except those supported by the record and those specifically admitted herein.

III.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

The Director has lawful custody of Haley pursuant to a judgment and sentence of the 7th Judicial District Court of Smith County, Texas, in cause number 007-80674-97, styled *The State of Texas v. Michael Wayne Haley*. *Ex parte Haley*, Application No. 45,796-01 at 28-29. Haley was charged by indictment with theft, a Class A misdemeanor enhanced to a state jail felony by two prior grades of theft. *Id.* at 26; *see also* TEX. PENAL CODE ANN. § 31.03(e)(4)(D) (Vernon 1995). Additionally, prior felony convictions for delivery of amphetamine and a prior felony conviction for robbery were alleged for enhancement of punishment. *Ex parte Haley* at 26. The offense occurred on April 9, 1997. *Id.* Haley entered a plea of not guilty to the charge and a plea of not true to the enhancement counts.[1] *Id.* At 28. On

[1] The judgment and sentence lists "guilty" next to "plea." *Ex parte Haley* at 28. This is a typographical error. Haley did in fact enter a plea of not guilty in open court. *See* Volume II of the Statement of Facts at page 146 (II SF 146). Further, although the judgment and sentence shows that Haley entered a plea of "not true" to the enhancement allegations, he declined to do so before the jury in open court. *Ex parte Haley* at 28; VI SF 19.

October 29, 1997, a jury found Haley guilty of theft, a state jail felony, found the enhancement allegations to be true, and sentenced him to sixteen years and six months imprisonment to be served in the Texas Department of Criminal Justice, Institutional Division ("TDCJ-ID"). *Id.*

Haley's conviction was affirmed by the Court of Appeals for the Sixth District of Texas in an unpublished opinion on January 12, 1999. *Haley v. State*, No. 06-98-00040-CR.[2] The Court of Criminal Appeals refused Haley's petition for discretionary review on May 26, 1999. *Haley v. State*, No. 432-99; *see also* affidavit from Troy C. Bennett, Jr., Clerk, Court of Criminal Appeals, attached as Exhibit A.

Haley has filed one state habeas application challenging his conviction. He filed the application in the trial court on February 24, 2000. *Ex Parte Haley* at 1. The Texas Court of Criminal Appeals denied the application without written order on the findings of the trial court without a hearing on June 21, 2000. *Id.* at cover.

B. Statement of Facts

The Court of Appeals for the Sixth District of Texas briefly described the facts of the case as follows:

> Chad Lanier, a loss prevention associate for Wal-Mart, testified that he observed Haley carrying a blue and white box, which Lanier believed contained a Texas Instruments calculator, down the back aisle of the store. Lanier testified

[2] A copy of the court of appeals's opinion can also be found in Haley's state habeas application, *Ex parte Haley* at 30-39.

> that Haley turned his back to him and appeared to put the merchandise in the front of his pants. Haley then walked out of the store exit near the automotive department. Lanier then watched Haley get into a truck and drive around to the front of the store. Although Haley left the inside of the store, he remained on Wal-Mart property during the entire episode. Lanier never lost sight of Haley. Haley then reentered the store through the front door carrying a blue and white box. Haley approached the service desk and was able to exchange the calculator for other merchandise. Lanier then approached Haley, identified himself as a loss prevention associate, and asked Haley to accompany him to the back of the store. Lanier took a photograph of the calculator in the blue and white box.

Haley v. State, slip op. at 2-3.

IV.

STATE COURT RECORDS

Copies of Haley's state court records will be forwarded to the court as soon as they have been reproduced. An affidavit from Troy C. Bennett, Jr., Clerk, Court of Criminal Appeals, is attached as Exhibit A.

V.

PETITIONER'S ALLEGATIONS

The Director understands Haley to allege the following:

1. His sentence was improperly enhanced.
2. No evidence exists to support the state's contention that he had previously been convicted of robbery.

3. The state's jury argument was improper.

4. He received ineffective assistance of counsel because counsel:

   (1) failed to investigate the prior convictions the state used to enhance his sentence;

   (2) failed to object when the state re-opened for the purpose of reading the enhancement paragraphs during the punishment phase;

   (3) failed to object to the state's failure to re-offer evidence;

   (4) failed to object to the fact that Haley did not enter a plea to the enhancements;

   (5) gave him erroneous advice when he told Haley to not enter a plea to the enhancements;

   (6) failed to object to the state's argument;

   (7) failed to file a motion for discovery;

   (8) failed to conduct an independent investigation and did not interview the state's witnesses; and

   (9) failed to subpoena the Wal-Mart videotape.

VI.

EXHAUSTION OF STATE REMEDIES

The Director believes that Haley has sufficiently exhausted his state remedies with regard to the claims he raises in his federal petition. Therefore, the Director does not move to dismiss his federal petition for failure to exhaust state court remedies.

VII.

ANSWER WITH BRIEF IN SUPPORT

A. Standard of Review

Haley filed the instant petition on August 24, 2000. Fed. Writ Petition at 1. Therefore, his petition is subject to review under the amendments to the federal habeas corpus statutes embodied in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See* 28 U.S.C. § 2254 (2000); *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 2068 (1997) (holding the AEDPA only applies to those noncapital habeas corpus cases filed after its effective date of April 24, 1996). Under the amended § 2254(d), Haley may not obtain federal habeas corpus relief

> with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). A state court decision may be "contrary to" Supreme Court law in two ways: (1) if the

state court arrives at a conclusion opposite of the Supreme Court on a question of law; and (2) if the state court "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent" and arrives at an opposite conclusion. *Williams v. Taylor*, 120 S. Ct. 1495, 1519 (2000) (citing *Green v. French*, 143 F.3d 865, 869-870 (4th Cir. 1998), *cert. denied*, 525 U.S. 1090, 119 S. Ct. 844 (1999)). In determining whether a state court decision involves an "unreasonable application" of Supreme Court law, a federal habeas court's "inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 1521. Under this clause, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, the application must also be unreasonable." *Id.* at 1522.

Further, in review of a state prisoner's federal habeas petition, "a determination of a factual issue made a state court shall be presumed to be correct," and the petitioner "shall have the burden of rebutting the presumption by clear and convicing evidence." 28 U.S.C. § 2254(e)(1).

B. Haley's claim that his sentence was improperly enhanced is meritless.

Haley claims that his sentence was unlawfully enhanced because the enhancement paragraphs failed to satisfy state law with regard to punishing habitual offenders. Fed. Writ Petition at 7, brief at 3-4. Haley raised this claim in his state habeas application. *Ex parte Haley* at 4-6. The trial court recommended that relief be denied and the Court of Criminal Appeals denied the

application without written order on the findings of the trial court without a hearing. *Id.* at 44, cover. This was an adjudication on the merits. *Singleton v. Johnson*, 178 F.3d 381, 384 (5th Cir. 1999). Therefore, this court cannot grant habeas corpus relief unless it determines that the state court's determination was in conflict with clearly established Federal law as determined by the Supreme Court or that it "was based on an unreasonable determination of the facts in light of the evidence." 28 U.S.C. § 2254(d).

Haley's contention is that his prior felony convictions do not satisfy the Texas habitual offender statute because his conviction in cause number 7-89-671 did not become final prior to the commission of his offense in cause number 7-91-1086. Fed. Writ Petition at 7, brief at 3-4. These convictions were alleged for enhancement of punishment in the indictment and the jury found these enhancement paragraphs to be true.[3] *Ex parte Haley* at 26, 28. The statute in question states as follows:

> If it is shown on the trial of a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of two felonies, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished for a second-degree felony.

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[3] The state abandoned enhancement paragraph number 5. *Ex parte Haley* at 28.

TEX. PENAL CODE ANN. § 12.42(a)(2) (Vernon 1995). In cause number 1-89-671, Haley was convicted of delivery of a controlled substance on October 18, 1991. VI SF State's Exhibit 6. However, the offense in cause number 7-91-1086 for attempted robbery occurred on October 15, 1991, before Haley's conviction in cause number 1-89-671 became final. VI SF State's Exhibit 6. Thus, Haley is correct in his assertion that the enhancement paragraphs as alleged in the indictment do not satisfy section 12.42(a)(2) of the Texas Penal Code. TEX. PENAL CODE ANN. § 12.42(a)(2) (Vernon 1995); Fed. Writ Petition at 7, brief at 3-4.

Nonetheless, Haley's sentence was properly enhanced. Section 12.35 of the Texas Penal Code provides that "[a]n individual adjudged guilty of a state jail felony shall be punished for a third degree felony if it is shown on the trial of the offense that . . . the individual has previously been finally convicted of any felony . . . for which the judgment contains an affirmative finding under Section 3g(a)(2), Article 42.12, Code of Criminal Procedure." TEX. PENAL CODE ANN. § 12.35(c)(2)(B) (Vernon 1995). Further, Section 12.42 of the Texas Penal Code states that "[i]f it is shown on the trial of a state jail felony punishable under Section 12.35(c) or on the trial of a third degree felony that the defendant has been once before convicted of a felony, on conviction he shall be punished for a second-degree felony." TEX. PENAL CODE ANN. § 12.42(a)(3) (Vernon 1995). In cause number 7-91-1086, Haley was convicted of attempted robbery and was found to have used or exhibited a deadly weapon, a claw-hammer, during the commission of the offense. VI SF State's Exhibit 6; *Ex parte Haley* at 26. Thus, Haley's conviction in cause number 007-80674-97, the conviction he is challenging, is a state jail felony punishable under Section 12.35(c). *Ex*

parte Haley at 28. Further, Haley had also previously been convicted of the felony of delivery of a controlled substance in cause number 1-89-671. VI SF State's Exhibit 6; *Ex parte Haley* at 26. Therefore, Haley had to be punished for a second-degree felony according to state law. Haley received a sixteen year, six month sentence, which falls within the range of punishment for a second-degree felony. *Ex parte Haley* at 28; TEX. PENAL CODE ANN. § 12.33(a) (Vernon 1995). Therefore, Haley's sentence was properly enhanced according to state law, and his claim to the contrary is meritless.

Additionally, on state habeas review, the trial court found that the indictment was correctly enhanced. *Ex parte Haley* at 44. Based on this finding, Haley's claim that his conviction was improperly enhanced has no merit. Under 28 U.S.C. § 2254(e)(1), this finding is entitled to a presumption of correctness and Haley has failed to meet his burden of rebutting the presumption with clear and convincing evidence.

Finally, while Haley's claim lacks merit for the reasons discussed above, it should also be noted that the Texas Court of Criminal Appeals denied his claim when it denied his state writ application without written order on the findings of the trial court without a hearing. *Ex parte Haley* at cover. This determination did not result "in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *See* 28 U.S.C. § 2254 (d)(1) (1999). In addition, the decision was not based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d)(1) (1999). Consequently, this court cannot grant habeas relief.

C. *Haley's claim that the evidence was insufficient with regard to a prior conviction is procedurally barred from federal habeas review.*

Haley alleges that the state presented no evidence to support its claim that he had previously been convicted of robbery. Fed. Writ Petition at 7, brief at 4. However, Haley did not present this claim to the Texas Court of Criminal Appeals in his petition for discretionary review. *Haley v. State*, No. 432-99 at 1-3. Haley first presented this claim to the trial court and the Texas Court of Criminal Appeals in his state application for writ of habeas corpus. *Ex parte Haley* at 6-7. The trial court denied relief and specifically found that Haley could not raise a claim of sufficiency of the evidence through a writ of habeas corpus. *Id.* at 44. The Texas Court of Criminal Appeals denied relief without written order on the findings of the trial court without a hearing. *Id.* at cover. Accordingly, this claim is procedurally barred from federal habeas corpus review.

Federal review of a habeas claim is procedurally barred if the last state court to consider the claim expressly and unambiguously based its denial of relief on a state procedural default. *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553 (1991); *Harris v. Reed*, 489 U.S. 255, 263, 109 S. Ct. 1038, 1043 (1989); *Amos v. Scott*, 61 F.3d 333, 338 (5th Cir.), *cert. denied*, 116 S. Ct. 557 (1995). For the claim to be barred, the state court's opinion must contain a "plain statement" that its decision rests upon adequate and independent state grounds. *Harris*, 489 U.S. at 261-65, 109 S. Ct. at 1042-45. Moreover, where a state court has explicitly relied on a procedural bar, a state prisoner may not obtain federal habeas relief absent a showing of cause for the default and actual prejudice

attributable to the default, or that the federal court's failure to consider the claim will result in a miscarriage of justice. *Coleman*, 501 U.S. at 750, 111 S. Ct. at 2565. A miscarriage of justice in this context means that the petitioner is actually innocent of the crime of which he was convicted. *Sawyer v. Whitley*, 505 U.S. 333, 339-40, 112 S. Ct. 2514, 2519 (1992); *Smith v. Dixon*, 14 F.3d 956, 974 (5th Cir. 1994), cert. denied, 115 S. Ct 129 (1995). Finally, a state procedural rule not entitled to respect as an adequate and independent state ground unless the procedural rule is consistently applied. Amos, 61 F.3d at 339; *Reddix v. Thigpen*, 805 F.2d 506, 510 (5th Cir. 1986).

In this case, the trial court made the plain statement that Haley could not challenge the sufficiency of evidence in a state habeas application. *Ex parte Haley* at 44. Thereafter, the Texas Court of Criminal Appeals denied relief without written order on the findings of the trial court without a hearing. *Id.* at cover. Haley failed to present this claim to the Texas Court of Criminal Appeals in his petition for discretionary review. *See Haley v. State*, No. 432-99 at 1-3. The law in Texas is that claims of insufficient evidence may be raised on direct appeal but not in a state habeas proceeding. *Clark v. Texas*, 788 F.2d 309, 310 (5th Cir. 1986); *West v. Johnson*, 92 F.3d 1385, 1398 n. 18 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1847 (1997); *Renz v. Scott*, 28 F.3d 431, 432 (5th Cir. 1994).[4] Since, Haley has not shown cause and prejudice for his failure to raise this allegation in a petition for

[4] These cases make no distinction between claims of insufficiency with regard to the evidence at trial and the evidence pertaining to a prior conviction alleged for enhancement of punishment. *Id.*

discretionary review, this claim is procedurally barred from federal habeas corpus review.

D. Haley's claim that the state's jury argument was improper is meritless.

Haley claims that the state's jury argument was improper. Fed. Writ Petition at 7, brief at 5. Haley raised this claim in his state habeas application. *Ex parte Haley* at 7-8. The Court of Criminal Appeals denied the application without written order on the findings of the trial court without a hearing. *Id.* at cover. This was an adjudication on the merits. *Singleton*, 178 F.3d at 384. Therefore, this court cannot grant habeas corpus relief unless it determines that the state court's determination was in conflict with clearly established Federal law as determined by the Supreme Court or that it "was based on an unreasonable determination of the facts in light of the evidence." 28 U.S.C. § 2254(d).

On federal habeas corpus review of a state court conviction, the appropriate standard of review for claims of improper argument is "the narrow one of due process, and not the broad exercise of supervisory power." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S. Ct. 1868, 1871 (1974)). It "is not enough that the prosecutors' remarks were undesirable or even universlaly [sic] condemned." *Darden*, 477 U.S. at 181, 106 S. Ct. at 2471. Instead, to obtain relief on this claim, Haley must show that the comments in question "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*; *Ward v. Whitley*, 21 F.3d 1355, 1364 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1257 (1995). In order to establish this, "the petitioner must demonstrate

either persistent and pronounced misconduct or that the evidence was so insubstantial that (in probability) but for the remarks no conviction would have occurred." *Felde v. Blackburn*, 795 F.2d 400, 403 (5th Cir. 1986), *cert. denied*, 484 U.S. 873, 108 S. Ct. 210 (1987). When claiming improper comments by the prosecutor, the petitioner carries a substantial burden. *United States v. Diaz-Carreon*, 915 F.2d 951, 956 (5th Cir. 1990). Additional, improper argument by a prosecuting attorney should be found to exceed constitutional limits only in the most "egregious cases." *Ortega v. McCotter*, 808 F.2d 406, 410 (5th Cir. 1987) (quoting *Menzies v. Procunier*, 743 F.2d 281, 288-89 (5th Cir. 1984) (citation omitted)).

Haley claims that the prosecutor's argument during the punishment phase of the trial was improper because the prosecutor led the jury to believe that Haley had been to prison twice before. Fed. Writ Petition at 7, brief at 5. Haley alleges that the argument was improper because he has only been to prison once. *Id.* Haley's claim is meritless and refuted by the record. In the state's opening argument during the punishment phase of the trial, the prosecutor stated "this Defendant has been to prison before. As a matter of fact, he's been to prison more than once." VI SF 7. In the state's closing argument during the punishment phase of the trial, the prosecutor stated, "You are dealing with a person who has already been to the penitentiary on two occasions . . ." VI SF 26. The state's point was that Haley had two prior convictions, was incarcerated for these convictions and, consequently, should be punished as a repeat offender. VI SF 7, 26-27. Further, the state proved its case because the jury found the enhancement allegations to be true. VI SF 43-44. Thus, Haley's claim is refuted by the record and not supported by any evidence.

Additionally, a prosecutor's assertion of what he or she believes the evidence will show or has shown is not error. *Ortega*, 808 F.2d at 410. Haley certainly has not carried his burden of showing that the state's remarks rendered the trial unfair, particularly given that they were true. *Darden*, 477 U.S. at 181, 106 S. Ct. at 2471; *Diaz-Carreon*, 915 F.2d at 956. This claim must be denied.

Finally, while Haley's claim lacks merit for the reasons discussed above, the Texas Court of Criminal Appeals denied his claim when it denied his state writ application without written order on the findings of the trial court without a hearing. *Ex parte Haley* at cover. This determination did not result "in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *See* 28 U.S.C. § 2254(d)(1) (1999). In addition, the decision was not based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d)(2) (1999). Consequently, this court cannot grant habeas relief.

E. Haley's claims of ineffective assistance of counsel are without merit and must be denied.

Haley raises nine claims of ineffective assistance of counsel. Fed. Writ Petition at 8, brief at 5-10. Haley raised these claims in his state habeas application. *Ex parte Haley* at 9-17. The Court of Criminal Appeals denied the application without written order on the findings of the trial court without a hearing. *Id.* at cover. This was an adjudication on the merits. *Singleton*, 178 F.3d at 384. Therefore, this court cannot grant habeas corpus relief unless it determines that the state court's determination

was in conflict with clearly established Federal law as determined by the Supreme Court or that it "was based on an unreasonable determination of the facts in light of the evidence." 28 U.S.C. § 2254(d).

The Supreme Court established a two-prong test for deciding ineffective assistance of counsel claims in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct 2052 (1984). Under the *Strickland* test, a defendant must show that counsel's performance was deficient and that the deficiency prejudiced his defense. *Id.*, 466 U.S. at 687, 104 S. Ct. at 2064. A reviewing court may dispose of a claim if either counsel rendered reasonably effective assistance or there was a lack of prejudice. If one factor is found to be dispositive, it is not necessary that the court address the other. *Id.*, 466 U.S. at 697, 104 S. Ct. at 2069-70. The burden of proof in a habeas corpus proceeding attacking the effectiveness of trial counsel is upon the petitioner, who must demonstrate that ineffectiveness by a preponderance of the evidence. *Jernigan v. Collins*, 980 F.2d 292, 296 (5th Cir. 1992), *cert. denied*, 508 U.S. 978, 113 S. Ct. 2977 (1993).

Under the *Strickland* analysis, the petitioner has the burden of proof to demonstrate that his attorney's performance was deficient in order to satisfy the first prong of the two-prong test. *Jernigan*, 980 F.2d at 296. Courts 'must be highly deferential" to counsel's conduct and a petitioner must show that counsel's performance fell beyond the bounds of prevailing, objective professional standards. *Strickland*, 466 U.S. at 687-89, 104 S. Ct. at 2064-65. A reviewing court "must strongly presume that trial counsel rendered adequate assistance and that the challenged conduct was the product of a reasoned trial strategy." *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th

Cir. 1992), *cert. denied*, 590 U.S. 921, 113 S. Ct. 3035 (1993). Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066; *Smith v. Murray*, 477 U.S. 527, 535-536, 106 S. Ct. 2661, 2667 (1986). A particular decision not to investigate must be directly assessed for reasonableness under the circumstances, applying a heavy measure of deference to counsel's judgments. Id. In addition, "every effort must be made to eliminate the distorting effect of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Under the second prong of *Strickland*, Haley may not simply allege but must "affirmatively prove" prejudice. *Id.*, 466 U.S. at 693, 104 S. Ct. at 2067. "A mere allegation of prejudice is not sufficient to satisfy the prejudice prong of the *Strickland* test."

Claim 1

In his first claim of ineffectiveness, Haley claims that his attorney failed to investigate the prior convictions used to enhance his sentence. Fed. Writ Petition brief at 5-7. Specifically, Haley claims that his attorney failed to discover that his conviction in cause number 1-89-671 became final after to the commission of his offense in cause number 7-91-1086. *Id.* at 5-6. Haley also alleges that the state used a conviction of robbery to enhance his sentence even though he was never convicted of robbery, which he claims his attorney also failed to discover. *Id.* Haley contends that these failures on the part of his attorney resulted in the unlawful enhancement of his sentence and demonstrate that his lawyer did not [sic] a

firm command of the facts of the case. *Id.* Haley's claims are completely meritless because, as discussed in section VII, B, *supra*, Haley's sentence was properly enhanced under Texas law. The enhancement counts were sufficient to punish Haley for a second-degree felony. Thus, Haley cannot demonstrate any error on the part of his attorney with regard to investigating his prior convictions. This claim must be denied.

Claims 2, 3, 4 and 5

In claims 2 through 5, Haley claims that his attorney failed to object when the state re-opened for the purpose of reading the enhancement paragraphs during the punishment phase; that his attorney failed to object when the state did not re-offer the witness testimony elicited during the punishment phase; that his attorney failed to object when the state did not re-offer the witness testimony elicited during the punishment phase; that his attorney failed to object when he was not allowed to enter a plea to the enhancement counts; and that his attorney gave his erroneous advice when he told him not to enter a plea to the enhancement counts. Fed. Writ Petition brief at 7-8.

Haley raised these claims on direct appeal, but as allegations of trial court error, not ineffective assistance of counsel. *Haley v. State*, slip op. at 5-7. The Sixth Court of Appeals discussed these claims as follows:

> The enhancement counts were not read to the jury, at the beginning of the punishment phase, and Haley was not given an opportunity to plead to the enhancements. Each side made a brief opening statement. The State presented one witness who proved up pen packets from Haley's

prior convictions, and the State then rested. Haley rested without cross-examining the State's witnesses or putting on any other evidence. The jury was then excused while the court prepared the charge. The trial court then realized that the enhancements had not been read to the jury as required by law, and Haley had not been given an opportunity to plead to them. Before bringing the jury back in and allowing the State to reopen to read the enhancements, the trial court asked Haley if he would like to enter a plea to the enhancements before the jury. Haley stated that he did not want to enter a plea to the enhancements and that he did not want the trial court to tell the jury that he was given such an opportunity. The jury was then brought back in, and the enhancement paragraphs were read to them. No mention was made to the jury of either a plea by Haley or an opportunity to plead that he chose to forego. The State did not reoffer the witness testimony elicited during the punishment phase, nor did the defense stipulate to the evidence presented. Haley did not object to the reading of the enhancements or to the State's failure to reoffer evidence.

The reading of the enhancement paragraphs during the punishment phase of the trial is mandatory. TEX. CODE CRIM PROC. ANN. art. 36.01 (Vernon Supp. 1999); *Turner v. State*, 897 S.W.2d 786 (Tex. Crim. App. 1995). However, error which results from not reading the enhancement paragraphs and not entering a plea can be cured at trial. Upon learning of the error the indictment should be read to the jury, the accused should then enter a plea, and the State should reintroduce the evidence; or the parties may stipulate to the evidence. *Warren v. State*,

693 S.W.2d 414, 416 (Tex. Crim. App. 1985). In the instant case, any error by the trial court in not requiring prior evidence to be reintroduced or by allowing the jury to consider the evidence presented before the reading of the enhancements was waived by Haley's failure to object on that ground. *See Ridge v. State*, 855 S.W.2d 234, 236 (Tex. App.–Fort Worth 1993, no pet.) (failure of defendant in narcotics prosecution to object to failure of state to reintroduce character testimony after reading enhancements and taking plea waived any error).

Additionally, any error by the trial court in failing to elicit a plea from Haley to the enhancements after the enhancements were read to the jury is waived under the invited error doctrine. "[T]he principle is that, if, during the progress of the cause, any party thereto request or move the court to make an erroneous ruling, and the court rule in accordance with such request or motion, he cannot take advantage of the error on appeal. *Gresham v. Harcourt*, 93 Tex. 149, 53 S.W. 1019, 1021 (1899). Even fundamental error is waived if it is invited by the appellant at trial. *Cadd v. State*, 587 S.W.2d 736, 741 (Tex. Crim. App. 1979). Haley specifically requested that the trial court not ask him for a plea to the enhancements in front of the jury and also requested the trial court not to inform the jury that he had an opportunity to make a plea to enhancements. Haley is estopped by the doctrine of invited error from raising this complaint on appeal. *Capistran v. State*, 759 S.W.2d 121, 124 (Tex. Crim. App. [Panel Op.] 1982).

Haley v. State, slip op. at 5-7; *see also* VI SF 17-24. Haley now contends that had his attorney made the proper

objections to these trial court errors, these errors could have been cured at trial or at least preserved for appeal. Fed. Writ Petition brief at 7-8. However, Haley cannot demonstrate ineffectiveness.

In the context of ineffective assistance of counsel at the punishment state, "a court must determine whether there is reasonable probability that but for trial counsel's errors the defendant's non-capital sentence would have been significantly less harsh." *Spriggs v. Collins*, 993 F.2d 85, 88 (5th Cir. 1993). Factors to be considered in making this determination are a comparison of the actual sentence imposed with the maximum and minimum sentence that the defendant was facing and the mitigating and aggravating factors that were presented to the jury. *Id.* at 88-89. Haley was facing a minimum punishment of 180 days to two years, the punishment range for a state jail felony, if the state failed to prove the enhancement counts, or a maximum punishment of two to twenty years, the punishment range for a second-degree felony, if the state proved the enhancement counts. TEX. PENAL CODE ANN. §§ 12.33 and 12.35 (Vernon 1995); VI SF 19-20. Yet, Haley's claims of ineffectiveness do not pertain to the validity of the enhancement counts, but rather to the procedure that must be followed in presenting the enhancement counts, which was discussed in the court of appeal's opinion. The Court of Criminal Appeals has held that the reading of the enhancement counts and the entering of a plea to those counts during the punishment stage is mandatory; failure to do so results in automatic reversal and a new punishment hearing. *Turner*, 897 S.W.2d at 788-89. Thus, Haley must be claiming that his attorney's failure to object with regard to the procedure that was followed in this case was prejudicial because he

would have received a new punishment hearing if his attorney had preserved error. However, this claim is meritless.

First, under Texas law, an issue is not joined until the indictment is read and the defendant enters a plea. *Peltier v. State*, 626 S.W.2d 30, 31 (Tex.Crim.App. 1981). However, an issue can be joined once error is discovered. As the court of appeals stated, "Upon learning of the error the indictment should be read to the jury, the accused should then enter a plea, and the State should reintroduce the evidence; or the parties may stipulate to the evidence." *Warren*, 693 S.W.2d at 416; *Haley v. State*, slip op at 6. Haley claims that he received ineffective assistance because his attorney failed to object when the state was allowed to reopen and read the enhancement counts. However, the only way for error to be cured at trial was for the court to allow the state to read the enhancement counts even though evidence had already been presented. *Warren*, 693 S.W.2d at 416. Thus, Haley's attorney should not have objected to the court's decision because it was proper under *Warren*.

Haley also claims that he received ineffective assistance because his attorney did not object when he was not allowed to enter a plea to the enhancement counts. Fed. Writ Petition at 7-8. This is a patently false claim. After the error was discovered, the court asked Haley if he wanted to enter a plea. VI SF 18-19. On the advice of counsel, Haley declined to do so. Therefore, as the court of appeals found, Haley invited any error. *Haley v. State*, slip op. at 6-7. Haley certainly cannot now claim that he is entitled to a new punishment hearing given that he did not enter a plea in open court as required by law because it is clear he had the opportunity to do so and could have if

he wanted to. He also cannot claim that his attorney's advice to not enter a plea was erroneous and affected the outcome of the proceedings because if he had entered a plea, error would have been completely cured, the state would have proceeded with its case, and the result of the punishment phase would have been exactly the same. In other words, his plea had no bearing on the outcome of the proceeding. Essentially, the trial court satisfied the second element of *Warren* and Haley exercised his right not to enter a plea. Further, Haley has not alleged that his plea to the enhancement counts, or lack thereof, influenced the jury's decision in finding the enhancement counts to be true.

Additionally, Haley claims that his attorney erred in not objecting when the state failed to reintroduce the evidence after the indictment was read. It is true, as the court of appeals found, that the state did not reintroduce its evidence after the indictment was read. VI SF 17-25; *Haley v. State*, slip op. at 6. However, this does not mean that error was not cured and the issue was not joined. For instance, in a similar case, the Court of Appeals for the Second District of Texas held that when the state fails to re-offer its evidence after error has been discovered and the indictment has been read, any error by the trial court in not requiring the state to reintroduce evidence is insignificant because this does not contribute to the punishment actually assessed. *Ridge v. State*, 855 S.W.2d 234, 235-36 (Tex. App–Fort Worth 1993, no pet.). The *Ridge* court also found that the issue was properly joined because the indictment was read and the defendant's plea was taken. *Id.* at 236. Moreover, *Turner* requires reversal only if the indictment is not read and no plea is entered. *Turner*, 897 S.W.2d at 787-89. *Turner* does not state that

reversal is required if the state does not reintroduce its evidence. *Id.* Further, the Court of Criminal Appeals has held that an issue as to enhancement allegations is joined when a plea is entered to those allegations. *Ex parte Sewell*, 742 S.W.2d 393, 396 (Tex. Crim. App. 1987) ('We hold that when applicant entered his plea of "untrue" to the two enhancement allegation paragraphs at his 1975 trial on the issue of punishment he joined issue with the State as to those allegations.'). Thus, given that the indictment was read and Haley was allowed to enter a plea, even though he declined to do so and invited the error, the issue as to enhancements was joined and properly before the court. Therefore, Haley is not entitled to a new punishment hearing under state or federal law regardless of the fact that his attorney failed to make these objections.

Additionally, as stated above, Haley raises no other allegations of counsel error during the punishment phase of the trial that contributed to the length of his sentence. Further, Haley cannot claim that any trial court error in procedure actually contributed to his punishment because this procedure has no bearing on the weight of the evidence proving the enhancement counts. In other words, regardless of the procedures followed, the result of the punishment phase of the trial would have been the same. Haley has not shown that but for counsel's errors, his sentence would have been significantly less harsh. *Spriggs*, 993 F.2d at 88. These claims must be denied.

Claim 6

In his sixth claim of ineffective assistance of counsel, Haley alleges that his attorney failed to object to the state's jury argument. Fed. Writ Petition brief at 8. This is

a meritless claim. As discussed in section VII, D, *supra*, the prosecutor's jury argument, specifically the references to Haley's prior convictions during the punishment phase of the trial, was proper. Thus, it was not error for Haley's attorney to not object to these arguments. This claim must be denied.

Claim 7

In his seventh ineffectiveness claim, Haley contends that his attorney failed to file a motion for discovery. Fed. Writ Petition brief at 8-9. This claim is refuted by the records. As the clerk's records shows, Haley's attorney not only filed a motion for discovery and inspection of evidence, but also a motion for discovery of witnesses favorable to him, a motion for production of witnesses statements, a motion for discovery of evidence intended to be offered under Rule 37.07 of the Texas Code of Criminal Procedure, a motion for the production and inspection of evidence and information which may lead to evidence, a motion for production of alleged Rule 404(B) evidence, a motion for disclosure of extraneous offenses, and a request for a pre-trial hearing on all these motions. CR at 8-34, 46-51.[5] Moreover, even if Haley's attorney had not filed a motion for discovery, this would still not amount to error because the prosecutor clearly had an open file policy in this case and turned over all relevant evidence to Haley's attorney. II SF 11-12, 16. Thus, Haley's lawyer had no duty to file discovery requests and requests for exculpatory material because such requests were pointless. *See Smith v. Maggio*, 696 F.2d 365, 367 (5th Cir.), *cert. denied*, 464

[5] "CR" refers to the clerk's record followed by page number.

U.S. 831, 104 S. Ct. 111 (1983). Moreover, the prosecutor has an independent duty to produce exculpatory evidence. *Lockhart v. McCotter*, 782 F.2d 1275, 1282 (5th Cir. 1986), *cert. denied*, 479 U.S. 1030, 107 S. Ct. 873 (1987). Consequently, Haley's claim, even if it was true, would not be sufficient to establish ineffective assistance of counsel. This claim must be denied.

Claims 8 and 9

In his eighth claim, Haley contends that counsel failed to conduct an independent investigation and failed to interview the state's witnesses. Fed. Writ Petition brief at 8-9. In his ninth claim, Haley alleges that his attorney erred by not subpoenaing the Wal-mart video. *Id.* at 9-10. These are wholly meritless claims.

With regard to claims of failure to investigate, a petitioner must do more than merely allege a failure to investigate; he must state with specificity what the investigation would have revealed and how it would have altered the outcome of the case. *United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989). First, Haley simply contends that if his attorney had interviewed the state's key witnesses, he would have discovered that the witnesses were "putting the whole story together" and merely assumed that Haley stole the calculator. Fed. Writ Petition brief at 9. This is a frivolous claim. Haley provides no evidence to show that his attorney did not interview the state's witnesses. Additionally, the state's key witnesses, Chad Lanier, a Wal-Mart loss prevention associate, and Fabian Arteaga, both testified that they saw Haley take the calculator, move to the back of the store, place the calculator in his pants, exit the back of the store, drive his car around to the front of the store, reenter at the front,

and then exchange the calculator for other merchandise before being apprehended. IV SF 34-50; V SF 12-23. They also both testified that they never lost eye contact with Haley. IV SF 46; V SF 17. There is absolutely no evidence to suggest that these witnesses fabricated their stories or just assumed Haley stole the calculator. Consequently, Haley cannot demonstrate an investigation of these witnesses would have revealed evidence to the contrary or altered the outcome of the case. His claim is wholly conclusory and, as such, is insufficient to raise a constitutional issue. *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983) ("[a]bsent evidence in the record, a court cannot consider a habeas petitioner's bald assertions on a critical issue in his *pro se* petition . . . to be of probative evidentiary value.").

Next, Haley claims that had his attorney conducted an independent investigation, he would have discovered that Haley was never shown on videotape stealing the calculator. Fed. Writ Petition brief at 9. Haley also alleges that the videotape would have shown that he entered the store only once and not twice as the state's witnesses claimed. *Id*. Thus, he claims his attorney was ineffective for not subpoenaing the videotape. *Id*. These claims are completely meritless. Haley provides no evidence to show that any videotape actually exists. During the guilt/innocence phase of the trial, not a single witness mentions anything about a videotape documenting the theft. *See* IV SF 16-79; V SF 8-71. Even if a videotape was made and failed to capture Haley stealing the calculator, this does not mean that Haley did not commit the theft. This would only mean that it was not caught on tape. As for Haley's claim that the videotape would have shown that he entered the store only once, this allegation is directly

refuted by the eye-witness testimony presented at trial, as discussed above. IV SF 34-50; V SF 12-23. Further, even if Haley was shown on tape entering the store only once, this does not refute eye-witness testimony. Haley is simply assuming that everything that happened in the store on the date in question was captured on videotape and that the videotape would prove to be exculpatory, discounting the fact that two Wal-Mart employees witnessed the theft. However, this is nothing more than a conclusory allegation unsupported by any evidence in the record. *Ross*, 694 F.2d at 1011.

Additionally, Haley claims that when he asked counsel to subpoena the tapes, his attorney stated that it would not be necessary because the state has the burden of proof. Assuming Haley's claim to be true, it appears that his attorney chose not to provide the state with any other evidence that might prove to be inculpatory. In other words, if a videotape existed, it could have confirmed the state's case, contrary to what Haley believes. Thus, his attorney's decision amounted to a legitimate strategic choice, which the Fifth Circuit is careful not to second guess. *Yohey v. Collins*, 985 F.2d 222, 228 (5th Cir. 1993). In short, Haley has failed to show that any of his attorney's actions amounted to deficient performance, let alone prejudice. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. These claims must be denied.

Additionally, on state habeas the [sic] review the trial court found that Haley did not receive ineffective assistance of counsel. *Ex parte Haley* at 44. Based on this finding, Haley's claims of ineffectiveness have no merit. Under 28 U.S.C. § 2254(e)(1), this finding is entitled to a presumption of correctness and Haley has failed to meet his burden of

rebutting the presumption with clear and convincing evidence.

Finally, while Haley's ineffectiveness claims lack merit for the reasons discussed above, it should also be noted that the Texas Court of Criminal Appeals denied his claims when it denied his state writ application without written order on the findings of the trial court without a hearing. *Ex Parte Haley* at cover. This determination did not result "in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *See* U.S.C. § 2254 (d)(1) (1999). In addition, the decision was not based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254 (d)(2) (1999). Consequently, this court cannot grant habeas relief.

VIII.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, the Director respectfully requests that Haley's petition for writ of habeas corpus be denied.

Respectfully submitted,

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Attorney General

MICHAEL T. McCAUL

Deputy Attorney General
For Criminal Justice

ROSS RAYBURN
Assistant Attorney General
Chief, Habeas Corpus Division

/s/ W. Erich Dryden
W. ERICH DRYDEN*
*Attorney in Charge Assistant Attorney General
State Bar No. 24008786

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400
(512) 936-1280 (FAX)

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, W. Erich Dryden, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Respondent Johnson's Answer with Brief in Support has been served by placing same in the United States Mail, postage prepaid, on this the 22nd day of January, 2001, addressed to:

Michael Wayne Haley
TDCJ-ID No. 821353
Michael Unit
P.O. Box 4500
Tennessee Colony, Texas 75886

/s/ W. Erich Dryden
W. ERICH DRYDEN
Assistant Attorney General

[Exhibit A]

CLERK'S OFFICE

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

I, TROY C. BENNETT, JR., Clerk of the Court of Criminal Appeals do hereby certify that as part of my duties I have care and custody of the records of the Court. I have searched the records and have found that the petition for discretionary review, in the name of **Michael Wayne Haley**, was refused on May 26th, 1999.

WITNESS my hand and seal of said court, at my office in Austin, Texas, this the 22nd day of January 2001, A.D.

Troy C. Bennett, Jr., Clerk

[Seal]

/s/
Deputy Clerk

[RECEIVED
U.S. DISTRICT COURT
EASTERN DISTRICT OF
TEXAS
FEB 14 2001
DAVID J. MALAND, CLERK
BY DEPUTY /s/]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

Michael Wayne Haley, **Petitioner,** **and** **Gary L. Johnson, Texas Department of Criminal Justice,** **Institutional Division,** **Respondent**	**Case No: No. 6:00-CV-518** **Magistrate Judge** **Judith K.Guthrie**

Response to Non-Motion

I

TO THE HONORABLE JUDGE OF SAID COURT: NOW COMES Michael Wayne Haley Petitioner and files this objections to the States answer with brief in support.

II

PETITIONERS OBJECTS TO EACH AND EVERY ANSWER OF RESPONDENTS

III

Petitioner objects to respondents answer on page 7, Respondent says Petitioners sentence was properly enhanced. Petitioners sentence was not enhanced properly, Respondent says in the same paragraph that Petitioner was convicted of Attempted Robbery and was found to have used a Deadly Weapon, Petitioner was returned on bench warrant around April of 1993 for the sole purpose of having the affirmative finding removed. Petitioner does not have access to court records, but records are available through the files of the clerk. Petitioners conviction in cause number 007-80674-97 is not a State Jail Felony punishable under Section 12.35(C), because Petitioner had the Affirmative finding removed from cause number **7-91-1086** therefore Petitioners sentence could not have been a Second Degree Felony.

Furthermore the section Respondent refers to 12.35(C) reads:

(C) An individual adjudged guilty of a State Jail Felony . . . (If it is shown on trial of the offense that:

The individual has previously been finally convicted of any felony . . . for which the judgement contains an affirmative finding under section 3g (a) (2). The State never used Attempted Robbery for enhancement, therefore it was not shown on the trial of the offense that the individual has previously been finally convicted of any felony . . . for which the judgement contains an Affirmative finding.

Petitioner objects to Respondents answer on page 8, Respondent says Petitioner claims that the evidence is insufficient, Petitioner is *not* raising a claim of sufficiency of the evidence but a claim of No Evidence. See **EX PARTE BARFIELD 697 SW 420,** Petitioner has never been convicted of Robbery therefore there can be no evidence of a prior conviction of Robbery. The jury could not have found that paragraph true beyond a reasonable doubt. For the jury to find the enhancement of Robbery true without the state presenting evidence is a violation of Petitioners right to Due Process of Law.

Petitioner objects to Respondents answer on page 9, Respondent says Petitioners claim that the States jury argument was improper is without merit. Petitioners claim has merit, on page 10 and 11 Respondent says the States point was that Haley had two prior convictions, was incarcerated for these convictions and, consequently should be punished as a repeat offender. Petitioner objects, the States point was clear, the state said 3 times that petitioner had been to prison twice, petitioner had been to prison only once, the states point was to make the jury believe that petitioner was someone worse than who he is, with the hope of the maximum punishment.

Petitioner objects to Respondents answer on page 11, Respondent says Haley's claim of Ineffective Assistance of Counsel are without merit. On page 13 Respondent says that Petitioners first claim, Attorney failed to investigate the prior convictions used to enhance his sentence are completely without merit because of the deadly weapon issue. Had petitioners counsel investigated the enhancement counsel would have found that the deadly weapon was removed making the enhancement improper.

Furthermore Petitioner told counsel that he had never been convicted of Robbery, State used a Robbery conviction to enhance Petitioner.

Petitioner had demonstrated error on the part of his attorney for his failure to have the prior conviction of Robbery removed thus making it a State Jail Felony.

Petitioner objects to Respondents answers on pages 13 to 18.

On page 15 Respondent said that Petitioner was facing 180 days to two years, if the State failed to prove the enhancement counts. State failed to prove the enhancement making the sentence a State Jail Felony.

On page 16 Respondent says Petitioner claims that he received Ineffective Assistance because his attorney did not object when he was not allowed to enter a plea to the enhancements, is a false claim. Petitioner objects. The same paragraph says " on the advice of counsel, Haley declined to do so" Counsel cannot advise his client to not do something that is mandatory. Petitioner has a Constitutional right to enter a plea of Not Guilty in front of the jury who is determining his guilt. Silence could not be considered as a plea of guilt. As Petitioner has been saying, Petitioner was returned on Bench Warrant to have the Affirmative findings removed from Cause number 7-91-1086 around April of 1993 therefore the result of the punishment Phase would not have been exactly the same had it not been for counsels errors, Petitioners sentence would have been a State Jail Felony. Jury would not have found the two enhancements paragraphs true.

On page 18 Respondent says Petitioners claim that his attorney failed to object to States jury argument is

without merit. Petitioner objects to Respondents answer, Respondent makes it sound like harmless error, however it is an injustice and very harmful. Petitioner has already demonstrated that the enhancements are improper. Even if they were enhanced properly by allowing the jury to believe Petitioner has been to prison twice instead of once, more than likely contributed to his 16 ½ year sentence instead of the minimum of two years. Counsel was told that Petitioner had only been to prison once, Counsel refused to object.

From page 18 to 21 Respondent answers Petitioners claims 7 through 9. Petitioner objects to Respondents answers to claim 8 and 9 on Page 19 through 21.

Petitioner prays that this Honorable Court will conduct a hearing and find that the enhancement of Attempted Robbery has no Affirmative finding and grant Petitioner a new punishment hearing.

Respectfully submitted

/s/ Michael Wayne Haley
Michael Wayne Haley
Petitioner - Pro Se

Certificate of Service

I Michael Wayne Haley, Petitioner, do hereby certify that a true and correct copy of the petitioners objection to the States answer with Brief in Support has been served by placing same in The United States mail on this 13rd day of February, 2001

Addressed to:

Office of the Attorney General
John Cornyn
P.O. Box 12548
Austin, Texas 78711-2548

[RECEIVED
U.S. DISTRICT COURT
EASTERN DISTRICT OF
TEXAS
MAR 29 2001
DAVID J. MALAND, CLERK]
[RECEIVED
U.S. DISTRICT COURT
EASTERN DISTRICT OF
TEXAS
MAR 29 2001
DAVID J. MALAND, CLERK
BY DEPUTY _____/s/_____]

March 26th 2001

The Honorable David J. Maland, Clerk
United States District Court
Eastern District of Texas

Re: Michael Wayne Haley vs. Gary L. Johnson
Director, Texas Department of Criminal
Justice Institutional Division
Civil Action No. 6:00 cv518

Dear Sir, Motion to Supplement
State Court Records

Enclosed please find a copy of a bench warrant in cause no. 7-91-1086 (Attempted Robbery). Please attach it to my Writ as evidence that the charge does not contain a deadly weapon.

Also on Feb 12th 2001 on objection to the States answer was mailed addressed to Magistrate Judge Judith K. Guthrie, along with my second request for appointment of counsel. Were these filed or do I need to refile them?

Thank You For Your Time

/s/ Michael Haley
Petitioner

** New Address:
Michael Haley #821353
Coffield Unit
Route 1 Box 150
Tennessee Colony, Texas 75884

File

* * *

[Unnecessary attachments omitted]

[Attachment to Motion to Supplement State Court Records]

No. 7-91-1086

THE STATE OF TEXAS	IN THE 7TH DISTRICT
VS.	COURT OF
MICHAEL WAYNE HALEY	SMITH COUNTY, TEXAS

NUNC PRO TUNC
JUDGMENT ON PLEA OF GUILTY OR NOLO CONTENDERE BEFORE COURT
WAIVER OF JURY TRIAL

Judge Presiding: LOUIS B. GOHMERT, JR.
Date of Judgment: 9/9/92
Attorney for State: REX THOMPSON
Attorney for Defendant: HUNTER BRUSH/KURT NOEL
Offense Convicted of: ATTEMPTED ROBBERY
Degree: 3RD
Date of Offense Committed: 10/15/91
Charging Instrument: INDICTMENT Plea: GUILTY
Terms of Plea Bargin [sic] N/A
Plea to Enhancement Paragraph(s) N/A
Findings on Enhancement: N/A
Findings on Use of Deadly Weapon: N/A
Date Sentence Imposed: 9/9/92
Costs: 84.50
Punishment and Place of Confinement: TEN (10) YEARS TDCJ
Date to Commence: 9/9/92
Time Credited: 330 DAYS
Total Amount of Restitution: -0-
Concurrent Unless Otherwise Specified.

JUDGMENT

The Defendant having been indicted in the above entitled and numbered cause for the felony offense of

and this cause being this day called, the State appeared by her assistant Criminal District Attorney REX THOMPSON, and the Defendant MICHAEL W. HALEY, appeared in person and his counsel HUNTER BRUSH/KURT NOEL, also being present and both parties announced ready and the Defendant in person and in writing in open Court having waived his right of trial by jury, such waiver being with the consent and approval of the Court and now entered of record on the minutes of the Court and such waiver being with the consent and approval of the Criminal District Attorney of SMITH County, Texas, in writing, signed by him, and filed in the papers of this cause before Defendant entered his plea herein, the Defendant was duly arraigned and in open Court pleaded GUILTY to the charge contained in the indictment; thereupon the Defendant was admonished by the Court of the consequences of the said plea and the Defendant is mentally competent and that he is uninfluenced in making said plea by any consideration of fear, or by and persuasion, or delusive hope of pardon prompting him to confess his guilt, the said plea was accepted by the Court and is now entered of record as the pleas herein of the Defendant. The Defendant in open Court, in writing, having waived the reading of the indictment, the appearance, confrontation, and cross-examination of witnesses, and agreed that the evidence may be stipulated and consented to the introduction of testimony by affidavits, written statements of witnesses and other documentary evidence, and such waiver and consent having been approved by the Court in writing and filed in the papers of the cause; Court having, hearing the Defendant's waiver of the reading of the indictment, the Defendant's plea thereto, the evidence submitted, and the

argument of counsel, is of the opinion from the evidence submitted that the Defendant is guilty as charged.

IT IS THEREFORE ADJUDGED BY THE COURT, that the said Defendant is guilty of the felony offense of

ATTEMPTED ROBBERY

as found by the Court, that the said Defendant committed said offense on the 15TH day of OCTOBER, 1991, that the punishment is hereby assessed at TEN (10) YEARS confinement in the Texas Department of Corrections, that the Defendant be punished in accordance with same and that the State of Texas do have and recover of the said Defendant all costs in this prosecution expended, for which execution will issue.

THEREUPON the said Defendant was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, and it appearing to the Court that the Defendant is mentally competent and understanding of the English language, the Court proceeded in the presence of said Defendant, his counsel also being present, to pronounce sentence against him, as follows:

IT IS THE ORDER OF THE COURT that said Defendant, who has been adjudged to be guilty of ATTEMPTED ROBBERY and whose punishment has been assessed by the Court at confinement in the Texas Department of Corrections for TEN (10) YEARS, be delivered by the Sheriff of SMITH County, Texas, immediately, to the Director of the Texas Department of Corrections or other person legally authorized to receive such convicts and said Defendant shall be confined in said

Texas Department of Corrections for TEN (10) YEARS in accordance with the provisions of the law governing the Texas Department of Corrections, and Defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

It is further ADJUDGED and DECREED by this Court that the sentence pronounced herein shall begin this date, and that the Defendant is granted 330 days credit for time served in jail.

/s/ Louis B. Gohmert, Jr.
Judge Presiding

Notice of Appeal: _____

4-6-93
Date Signed

[Thumb Print]

[FILED
U.S. DISTRICT COURT
EASTERN DISTRICT
COURT OF TEXAS
APR 26 2001
DAVID J. MALAND, CLERK
BY DEPUTY /s/]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

MICHAEL WAYNE HALEY	§	
v.	§	CIVIL ACTION NO.
	§	6:00cv518
DIRECTOR, TDCJ, ID	§	

ORDER

The Petitioner Michael Wayne Haley filed this application for the writ of habeas corpus alleging, *inter alia*, that his sentence was improperly enhanced. The State has answered the petition, contending that Haley's sentence was properly enhanced because he has a prior conviction containing an affirmative finding of a deadly weapon. As evidence of this, the State points to a judgment in cause 7-91-1086, dated September 9, 1992, which recites that Haley was convicted of attempted robbery, receiving a sentence of ten years' imprisonment commencing on September 9, 1992, with a "true" finding for the use of a deadly weapon.

Haley has now filed a motion to supplement the state court records (docket no. 17). Attached to this motion is a copy of a bench warrant setting a hearing in cause no. 7-91-1086 for April 6, 1993. Haley also attaches a copy of a

nunc pro tunc judgment in cause no. 7-91-1086 dated April 6, 1993. This judgment states that Haley was convicted of attempted robbery, receiving a ten-year sentence commencing on September 9, 1992, but the finding on use of a deadly weapon has been deleted; instead of reading "true," it now reads "N/A."

The gravamen of the State's argument that the sentence was enhanced correctly is the contention that Haley had been previously convicted of an offense involving a deadly weapon, which places him under Article 12.35(c) of the Texas Penal Code. However, Haley has offered evidence that this is not the case. It is accordingly

ORDERED that the Petitioner's motion to supplement the record, filed March 29, 2001 (docket n. 17) is GRANTED. It is further

ORDERED that the Respondent shall have thirty days in which to respond or otherwise plead to Haley's contention that he has not been convicted of a felony carrying an affirmative finding that a deadly weapon was used in the commission therein, given the apparent *nunc pro tunc*, judgment in cause no. 7-91-1086. It is further

ORDERED that the Clerk shall send to the Respondent a copy of Haley's motion to supplement the record, together with the attachments thereto, along with a copy of this order.

SIGNED this 26th day of April, 2001.

/s/ Judith K. Guthrie
Judith K. Guthrie
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

MICHAEL WAYNE HALEY	§	
	§	CIVIL ACTION NO.
Petitioner,	§	6:00CV518
	§	Magistrate
V.	§	Judith K. Guthrie
	§	
GARY L. JOHNSON,	§	
DIRECTOR *TEXAS*	§	
DEPARTMENT OF	§	
CRIMINAL JUSTICE,	§	
INSTITUTIONAL	§	
DIVISION,	§	
	§	
Respondent.	§	

RESPONDENT JOHNSON'S RESPONSE TO THIS COURT'S ORDER OF APRIL 26, 2001

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Respondent Gary L. Johnson, Director, Texas Department of Criminal Justice, Institutional Division, ("the Director"), by and through his attorney, the Attorney General of Texas, and files this his Response to this Court's Order of April 26, 2001.

I.

This is a habeas corpus case brought by Texas state prisoner Michael Wayne Haley ("Haley") under 28 U.S.C. §§ 2241, 2254. On April 26, 2001, this court ordered the Director to respond to Haley's argument that he has not been previously convicted of a felony that carried an affirmative finding of a deadly weapon. In cause number 7-91-1086, which was alleged for enhancement of punishment for Haley's current sentence, Haley was

convicted of attempted robbery and the judgment submitted by the state at trial indicated that Haley used or exhibited a deadly weapon,, a claw-hammer, during the commission of the offense. VI SF State's Exhibit 6. The Director relied on this finding in addressing the enhancement issue. Haley then submitted a copy of a *nunc pro tunc* judgment and sentence in cause number 7-91-1086 that does not show an affirmative finding of a deadly weapon. The Director has been in contact with the 7th District Court of Smith County, Texas, in order to obtain information and records explaining this apparent discrepancy. The Director, has received a certified copy of the judgment and sentence in cause number 7-91-1086 that lists "true" by the findings on use of a deadly weapon. *See* Exhibit A. After the judgment was entered, Haley's attorney filed a motion to correct the judgment and sentence because the docket sheet did not indicate that a finding of a deadly weapon was entered. Exhibit A. Given Haley's submission of the *nunc pro tunc* judgment to this court, it appears that the court may have granted the motion. However, the court did not forward a copy of this amended judgment to the Director after the Director requested a certified copy of the correct judgment and sentence. Yet, the court reporter for the proceedings in cause number 7-91-1086 submitted an affidavit with the documents the Director recently received. Exhibit A. The court reporter, Tanya Pierce, states in the affidavit that she has reviewed her notes of the trial proceedings in cause number 7-91-1086 and that her notes do not reveal that the judge entered a finding of a deadly weapon. Exhibit A. The Director has also received faxed documents from the Smith County District Attorney's Office pertaining to Haley's guilty plea in cause number 7-91-1086. *See* Exhibit B. These records do not indicate that

Haley stipulated to the finding of a deadly weapon when he entered his plea. Exhibit B. In sum, at this time the evidence tends to indicate that Haley's conviction in cause number 7-91-1086 may not contain an affirmative finding of a deadly weapon.

Nonetheless, with regard to the enhancement issue, Haley is still not entitled to relief because his claim is procedurally barred from federal habeas review.[1] It is well-settled that a claim is procedurally barred from federal habeas review if the last state court to consider these claims expressly and unambiguously based its denial of relief on a state procedural default. *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553 (1991); *Harris v. Reed*, 489 U.S. 255, 263, 109 S. Ct. 1038, 1043 (1989); *Amos v. Scott*, 61 F.3d 333, 338 (5th Cir.), *cert. denied*, 516 U.S. 1005, 116 S. Ct. 557 (1995). Moreover, where a state court has explicitly relied on a procedural bar, a state prisoner may not obtain federal habeas corpus relief absent a showing of cause for the default and actual prejudice that is attributable to the default, or that the federal court's failure to consider the claim will result in a miscarriage of justice. *Coleman*, 501 U.S. at 750, 111 S. Ct. at 2565. A miscarriage of justice in this context means that the petition is actually innocent of the crime of which he was convicted. *Sawyer v. Whitley*, 505 U.S. 333, 339-40, 112 S. Ct. 2514, 2519 (1992); *Smith v. Dixon*, 14 F.3d 956,

[1] Although the Director did not argue procedural default with regard to the enhancement claim in his original responsive pleading, the Director is not precluded from raising this issue now. *See Wiggins v. Procunier*, 753 F.2d 1318, 1321 (5th Cir. 1985) (procedural default is not waived as long as it is presented at some point during the district court proceedings).

974 (5th Cir. 1994), *cert. denied*, 513 U.S. 841, 115 S. Ct. 129 (1995).

In order to determine whether a claim is procedurally barred in this context, this reviewing court must "look through" to the last reasoned opinion addressing the claim. *Ylst v. Nunnemaker*, 501 U.S. 797, 805-06, 111 S. Ct. 2590, 2595-96 (1991). The Court of Appeals for the Sixth District of Texas addressed the enhancement issue on direct appeal and concluded that Haley failed to preserve any issue regarding enhancement for review on appeal because he failed to raise his complaints in the form of a timely objection or motion. Ex parte Haley, Application No. 45, 796-01 at 34-35. Specifically, the court found as follows:

> In his second and third points of error, Haley contends that error occurred when the trial court failed to ask Haley for his plea to the enhancement paragraphs at the beginning of the punishment stage of the trial and then allowed the State to reopen for purposes of reading the enhancement paragraphs.
>
> The enhancement counts were not read to the jury at the beginning of the punishment phase, and Haley was not given an opportunity to plead to the enhancements. Each side made a brief opening statement. The State presented one witness who proved up pen packets from Haley's prior convictions, and the State then rested. Haley rested without cross-examining the State's witnesses or putting on any other evidence. The jury was then excused while the court prepared the charge. The trial court then realized that the enhancements had not been read to the jury as required by law, and Haley had not been given

> an opportunity to plead to them. Before bringing the jury back in and allowing the State to reopen to read the enhancements, the trial court asked Haley if he would like to enter a plea to the enhancements before the jury. Haley stated that he did not want to enter a plea to the enchancements and that he did not want the trial court to tell the jury that he was given such an opportunity. The jury was then brought back in, and the enhancement paragraphs were read to them. No mention was made to the jury of either a plea by Haley or an opportunity to plead that he chose to forego. The State did not reoffer the witness testimony elicited during the punishment phase, nor did the defense stipulate to the evidence presented. Haley did not object to the reading of the enhancements or to the State's failure to reoffer evidence.
>
> The reading of the enhancement paragraphs during the punishment phase of the trial is mandatory. TEX. CODE CRIM PROC. Ann. art. 36.01 (Vernon Supp. 1999); *Turner v. State*, 897 S.W.2d 786 (Tex. Crim. App. 1995). However, error which results from not reading the enhancement paragraphs and not entering a plea can be cured at trial. Upon learning of the error the indictment should be read to the jury, the accused should then enter a plea, and the State should reintroduce the evidence; or the parties may stipulate to the evidence. *Warren v. State*, 693 S.W.2d 414, 416 (Tex. Crim. App. 1985). In the instant case, any error by the trial court in not requiring prior evidence to be reintroduced or by allowing the jury to consider the evidence presented before the reading of the enhancements was waived by Haley's failure to object on that ground. See *Ridge v. State*, 855 S.W.2d 234, 236

> (Tex. App.-Fort Worth 1993, no pet.) (failure of defendant in narcotics prosecution to object to failure of state to reintroduce character testimony after reading enhancements and taking plea waived any error).

Ex parte Haley at 34-35. By failing to raise any objection whatsoever to the enhancement paragraphs when they were presented at trial, Haley is now precluded from raising any claim pertaining to the enhancements. The Fifth Circuit has consistently held that the Texas contemporaneous objection rule constitutes an adequate and independent state ground that procedurally bars federal habeas review of a petitioner's claims. *Sharp v. Johnson*, 107 F.3d 282, 285-86 (5th Cir. 1997) (citing *Amos*, 61 F.3d at 333); *Nichols v. Scott*, 69 F.3d 1255, 1280 n. 48 (5th Cir. 1995), *cert. denied*, 518 U.S. 1022, 116 S. Ct. 2559 (1996). The Sixth Court of Appeals's denial of the enhancement claims was based upon an adequate and independent state procedural rule; therefore, Haley's claim is procedurally barred unless he can demonstrate cause and prejudice or a miscarriage of justice. *Coleman*, 501 U.S. at 750, 111 S. Ct. at 2565. Haley has failed to allege cause and prejudice or that he is actually innocent of the crime for which he was convicted. Accordingly, this court should find his enhancement claims to be procedurally barred from federal habeas corpus review.

In the alternative, the invited error doctrine bars Haley from obtaining federal habeas corpus relief. On appeal, the Sixth Court of Appeals also found as follows:

> Additionally, any error by the trial court in failing to elicit a plea from Haley to the enhancements after the enhancements were read to the jury is waived under the invited error doctrine. "[T]he principle is that, if, during the progress of the cause, any party thereto request or move the court to make an erroneous ruling, and the court rule in accordance with such request or motion, he cannot take advantage of the error on appeal. *Gresham v. Harcourt*, 93 Tex. 149, 53 S.W. 1019, 1021 (1899). Even fundamental error is waived if it is invited by the appellant at trial. *Cadd v. State*, 587 S.W.2d 736, 741 (Tex. Crim. App. 1979). Haley specifically requested that the trial court not ask him for a plea to the enhancements in front of the jury and also requested the trial court not to inform the jury that he had an opportunity to make a plea to enhancements. Haley is estopped by the doctrine of invited error from raising this complaint on appeal. *Capistran v. State*, 759 S.W.2d 121, 124 (Tex. Crim. App. [Panel Op.] 1982).

Ex parte Haley at 35-36. Thus, the court of appeals found that Haley specifically requested not to enter a plea to or otherwise contest the enhancements. Consequently, he has no basis to challenge the enhancements. See *Ricalday v. Procunier*, 736 F.2d 203, 207 n.3 (5th Cir. 1984) (defendant would not be heard to complain with regard to a jury instruction that he requested); *United States v. Montemayor*, 684 F.2d 1118, 1123-24 (5th Cir. 1982) (error complained of was invited by defense counsel) (citing *United States v. Cook*, 586 F.2d 572, 578 (5th Cir. 1978), *cert. denied*, 442 U.S. 909, 99 S. Ct. 2821 (1979)); *United States v. Gray*, 626 F.2d 494, 501 (5th Cir. 1980) (*citing United States v. Easterly*, 444 F.2d 1236 (5th Cir. 1971)); *United States v. Baytank Inc.*, 934 F.2d 599, 607 (5th Cir. 1991). In sum, Haley is now precluded from complaining of his sentence's enhancement given his voluntary silence and inaction during trial. Therefore, although his prior

conviction in cause number 7-91-1086 may not contain an affirmative finding of a deadly weapon, he is not entitled to relief because he is barred from challenging his enhancements. For this reason, the Director respectfully requests that Haley be denied relief.

WHEREFORE, PREMISES CONSIDERED, the Director respectfully provides this response to the court's order and requests that Haley's petition for writ of habeas corpus be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Erich Dryden, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Respondent Johnson's Response to this Court's Order of April 26, 2001, has been served by placing same in the United States Mail, postage prepaid, on this the 23rd day of July, 2001, addressed to counsel for petitioner:

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/s/
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* * *

[Attachments Omitted]

No. 02-1824

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In The

Supreme Court of the United States

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Petitioner,

v.

MICHAEL WAYNE HALEY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S BRIEF

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QUESTION PRESENTED

Whether the "actual innocence" exception to the procedural default rule concerning federal habeas corpus claims should apply to noncapital sentencing error.

LIST OF PARTIES

The caption includes all parties to the Fifth Circuit appeal. *See* SUP. CT. R. 24.1(b).

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OPINIONS BELOW

The Fifth Circuit's opinion is reported at 306 F.3d 257 (CA5 2002). Pet. App. 1a-20a. The order denying the Director's petition for rehearing en banc and accompanying dissent is reported at 325 F.3d 569 (CA5 2003). Pet. App. 21a-29a. The district court's final judgment and memorandum opinion adopting the magistrate judge's report and recommendation are unreported. Pet. App. 30a-38a. Also unreported is the magistrate judge's report and recommendation. Pet. App. 38a-56a.

JURISDICTION

The Fifth Circuit issued its judgment and opinion on September 27, 2002, and denied the Director's petition for rehearing en banc on March 19, 2003. The Director timely filed a petition for writ of certiorari on June 13, 2003, *see* SUP. CT. R. 13.1, invoking the Court's jurisdiction under 28 U.S.C. §1254(1). The Court granted certiorari on October 14, 2003. *Dretke v. Haley*, 124 S. Ct. 385 (2003).

STATUTORY PROVISIONS INVOLVED

The Antiterrorism and Effective Death Penalty Act, 28 U.S.C. §2254 ("AEDPA"), provides, in relevant part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Texas Penal Code §12.42 provides, in relevant part:

(a)(2) If it is shown on the trial of a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of two felonies, and the second previous felony conviction

is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished for a second-degree felony.

Texas Penal Code §31.03 provides, in relevant part:

(a) A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property.

. . .

(e) Except as provided by Subsection (f), an offense under this section is:

. . .

(4) a state jail felony if:

. . .

(D) the value of the property stolen is less than $1,500 and the defendant has been previously convicted two or more times of any grade of theft.

STATEMENT OF THE CASE

Michael Wayne Haley is a career offender. From 1989 to 1997, he was convicted of six crimes. On March 28, 1989, Haley was convicted of theft by check; on December 3, 1991, he was again convicted of theft by check. State's Exhs. 1, 2.[1] He was sentenced to county jail for both offenses, for 180 days and ninety days respectively. *Id.* On October 18, 1991, Haley was convicted of delivery of amphetamines, for which he was sentenced to twelve

[1] These trial exhibits are contained in the envelope of State Court Records in the record on appeal.

years confinement in the Texas Department of Criminal Justice. J.A. 47-51. On September 9, 1992, he was convicted of attempted robbery and sentenced to another ten years in prison. J.A. 42-46. While out of prison on parole, Haley was convicted on November 2, 1995, of misdemeanor possession of marijuana and sentenced to 150 days in county jail. J.A. 36-39.

On October 29, 1997, Haley was again convicted of theft. J.A. 61-67. Haley's crime, the theft of a calculator, ordinarily would have been punishable as a Class A misdemeanor, but was instead elevated to a "state jail felony" based on his two prior theft convictions. J.A. 8-10; State's Exhs. 1, 2; TEX. PEN. CODE §31.03(e)(4)(D). Additionally, because he had two additional prior felony convictions (for delivery of amphetamines and attempted robbery),[2] Haley was classified as a habitual felony offender, which resulted in the enhancement of his sentence to that of a second-degree felony. J.A. 8-10; 40-51;

[2] Each of the courts below have at some point incorrectly identified Haley's prior attempted robbery conviction as being for "aggravated robbery." This incorrect characterization of Haley's conviction derives from Texas Department of Criminal Justice records that inaccurately reflected that conviction. Although the indictment charged Haley with aggravated robbery (for threatening a woman with a claw hammer in the course of an attempted robbery), J.A. 46, the district court's nunc pro tunc judgment correctly reflects that Haley was in fact convicted of attempted, not aggravated, robbery. J.A. 171-74. Because both attempted robbery and aggravated robbery are felonies that can trigger enhancement under Texas Penal Code §12.42(a)(2), the erroneous characterization of his prior conviction had no effect on the enhancement of Haley's sentence at trial, and is not at issue in this appeal. *See Haley v. Cockrell*, 325 F.3d 569, 570 n.2 (CA5 2003) (Smith, J., dissenting) ("Haley concedes that any such error is irrelevant, because his enhancement rested solely on the chronological order of his convictions."); Pet. App. 28a.

TEX. PEN. CODE §12.42(a)(2). Haley was sentenced to sixteen years and six months imprisonment. J.A. 61-67.

Under the Texas habitual felony offender statute, however, a defendant is not eligible for punishment enhancement merely because he has been convicted of two prior felonies. In addition, the statute requires that the convictions be "sequential"—*i.e.*, it requires the second previous felony conviction to be for an offense that was committed after the first previous felony conviction became final. TEX. PEN. CODE §12.42(a)(2). Accordingly, the indictment in this case alleged that Haley's first felony conviction for delivery of amphetamines had become final before the commission of his second felony of attempted robbery. J.A. 8-10. As the State has since conceded, however, this allegation was incorrect. Pet. App. 5a. In actuality, Haley committed attempted robbery on October 15, 1991,[3] three days before he was convicted of delivery of amphetamines on October 18, 1991.[4] J.A. 40-51.

The evidence submitted to the jury correctly reflected the fact of Haley's prior felony convictions, and the dates thereon indicated that the second crime was not subsequent

[3] The court of appeals incorrectly identified the date that Haley committed attempted robbery as October 12, 1991, Pet. App. 5a, based on Haley's statement to that effect in his habeas petitions. J.A. 87, 124. The indictment and judgment for that conviction state that the offense was committed on October 15, 1991. J.A. 42, 46. In either event, he committed attempted robbery before October 18, 1991.

[4] The record indicates that the sentence for delivery of amphetamines was entered on October 18, 1991. There is no indication in the record that Haley appealed that sentence, and, as a matter of Texas law, "[a]fter the State establishes that a defendant has been previously convicted, [the] Court will presume that a conviction is final when faced with a silent record regarding such." *Johnson v. State*, 784 S.W.2d 413, 414 (Tex. Crim. App. 1990) (en banc).

to the first final conviction. Nevertheless, Haley never objected to the non-sequential nature of the convictions,[5] and the jury convicted him as a habitual offender. J.A. 14-35; 61-67.

On direct appeal, Haley again failed to challenge the non-sequential nature of his prior convictions. Although he claimed the evidence was insufficient to support his conviction, he did not raise any challenge to the sufficiency of the evidence to support his enhanced sentence.[6]

The state court of appeals affirmed, finding that adequate evidence supported Haley's conviction. J.A. 80-81. The Texas Court of Criminal Appeals refused Haley's petition for discretionary review. Pet. App. 4a.

[5] Although Texas law requires the enhancement paragraphs to be read to the jury during the punishment phase of the trial, *see* TEX. CODE CRIM. PROC. art. 36.01, the prosecution inadvertently failed to read them before the jury was excused to deliberate. Once the trial court realized the error, it reopened the evidence to allow the prosecution to read the enhancement paragraphs to the jury and to afford Haley the opportunity to plea. J.A. 17-22; *see also Haley v. State*, No. 06-98-00040-CR, J.A. 76-77. Haley, however, refused to plea to the enhancement paragraphs and requested that the jury not be informed that he had been given the opportunity to plea. J.A. 18-19. The court granted his request, and the jury found the enhancements to be true. J.A. 19; 61-67.

[6] On direct appeal, Haley also challenged the failure to read the enhancement paragraphs to the jury at the beginning of the punishment phase, the failure to obtain his plea to them, and the decision to allow the State to reopen the evidence to read the enhancement paragraphs. J.A. 76. The court rejected Haley's arguments concerning the reading of the enhancement paragraphs and the reopening of the evidence on the grounds that he had waived any error by failing to object at trial, J.A. 77, and his challenge to the failure to obtain his plea on the grounds that he had waived any error under the doctrine of invited error, J.A. 78.

In his state habeas petition, Haley alleged for the first time that his sentence had been improperly enhanced because of the non-sequential nature of his prior convictions. J.A. 85; 87-89. The state habeas court recommended that Haley's application be denied because this complaint, properly couched under state law as a challenge to the sufficiency of the evidence for the enhancement, is not cognizable in a state post-conviction proceeding, but can be brought only on direct appeal. J.A. 107-08; *see also Ex parte McWilliams*, 634 S.W.2d 815, 818 (Tex. Crim. App. 1980); *Renz v. Scott*, 28 F.3d 431, 432 (CA5 1994); *Clark v. Texas*, 788 F.2d 309, 310 (CA5 1986). Haley also claimed that he had received ineffective assistance of counsel at trial because, among other things, his counsel "never investigated [the] State's contention on enhancements." J.A. 85; 92-95. The state habeas court considered that claim and concluded that Haley's counsel was not ineffective. J.A. 108. The Texas Court of Criminal Appeals subsequently denied Haley's state habeas application based on the findings of the trial court. J.A. 109.

Haley timely filed his federal habeas application asserting that there was no evidence to support the sequential nature of the enhancements as stated in the indictment. J.A. 110-31. The Director[7] responded that Haley's claim was procedurally barred because Haley failed to raise the complaint on direct appeal. J.A. 142-44.

The magistrate judge recommended that, despite the procedural bar, Haley's application be granted with respect to sentencing because Haley had shown he was "actually

[7] Respondent Doug Dretke will be referred to herein as "the Director."

innocent" because he lacked the timely predicate violation for sentencing as a habitual offender under Texas law.[8] Pet. App. 48a-50a, 55a.

Haley also reasserted an ineffective assistance of counsel claim, alleging nine specific instances of ineffectiveness at trial, and also advanced that the prosecutor had made improper jury argument. J.A. 118-19; 125-31. The magistrate judge addressed and recommended denial of all these claims with the exception of the ineffectiveness claim as to the improper enhancement, which she declined to discuss separately because she had granted Haley habeas relief on the merits. Pet. App. 50a-55a. The district court adopted the magistrate judge's report and recommendations, granted Haley habeas relief on the ground that he was "actually innocent" of his sentence, and denied all other relief. Pet. App. 37a.

The Fifth Circuit affirmed, holding that the "actual innocence" exception to the procedural bar doctrine applies to noncapital cases involving the application of habitual felony offender sentencing provisions.[9] *Haley v. Cockrell*,

[8] The magistrate judge also discussed, at some length, the discrepancy in the records concerning Haley's prior conviction for attempted robbery. Pet. App. 49a. As explained previously, however, *see supra* note 2, Haley's sentence was not enhanced based on the nature of the robbery offense, but solely because of the believed sequential nature of that conviction in relation to Haley's conviction for delivery of amphetamines.

[9] The Fifth Circuit also held that Haley had demonstrated he was "actually innocent" of having used a deadly weapon in the commission of his previous attempted robbery. Pet. App. 19a. This discussion is not relevant to the issue before this Court, however, because, as previously explained, *see supra* note 2, the State did not enhance Haley's sentence based on the inaccurate deadly weapon finding. Additionally, the court of appeals incorrectly stated that "Haley was not convicted of two

306 F.3d 257 (CA5 2002); Pet. App. 13a. In so doing, the Fifth Circuit acknowledged a growing division among the circuit courts on the issue. Pet. App. 14a-16a. Three circuits—the Seventh, Eighth, and Tenth—have held that the "actual innocence" exception does not apply to sentencing in noncapital cases. *Embrey v. Hershberger*, 131 F.3d 739 (CA8 1997) (en banc) (holding that the "actual innocence" exception applies only to sentencing in capital cases); *Hope v. United States*, 108 F.3d 119 (CA7 1997) (holding that the "actual innocence" sentencing exception did not survive the enactment of the AEDPA); *Reid v. Oklahoma*, 101 F.3d 628 (CA10 1996) (holding that the "actual innocence" exception does not apply in cases involving challenges to noncapital sentences). The Second Circuit, on the other hand, has extended the exception to all sentencing proceedings. *Spence v. Superintendent, Great Meadow Corr. Facility*, 219 F.3d 162 (CA2 2000). And reaching a middle ground, the Fourth Circuit—along with the Fifth as a result of this case—have applied the exception to noncapital cases in the context of the application of habitual offender provisions. *United States v. Mikalajunas*, 186 F.3d 490 (CA4 1999).

The Director timely filed a petition for rehearing en banc, which was denied. Pet. App. 21a. Judge Smith, joined by Judges Jolly, Jones, Barksdale, Garza, and Clement dissented from the denial, pointing out the national importance of this issue and the well-developed circuit split. Pet. App. 21a-29a. On June 13, 2003, the Director timely filed the petition for writ of certiorari asking the Court to review the question whether the

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felonies." Pet. App. 19a. Haley was in fact convicted of two prior felonies—delivery of amphetamines and attempted robbery. J.A. 40-51.

"actual innocence" exception should allow federal habeas review of a procedurally barred claim concerning noncapital sentencing-phase error. On October 14, 2003, the Court granted certiorari.

SUMMARY OF THE ARGUMENT

Federal courts cannot set aside a state criminal conviction that rests on adequate and independent state grounds. That rule, and the procedural-default bar in particular, derive from a fundamental respect for federalism, comity, and finality. Hence, a claim that has been procedurally defaulted can be reviewed on federal habeas only upon a showing of cause and prejudice, absent extraordinary circumstances. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

The lone exception to this bedrock rule—drawn from prior language in 28 U.S.C. §2244 that looked to the "ends of justice"—is that procedurally defaulted claims may be reviewed to avoid a "miscarriage of justice." That exception, in turn, has been articulated in two specific circumstances.

First, if a defendant can show he is "actually innocent" of the crime, that will allow a federal habeas court to overcome the procedural bar. Second, if he can show, by clear and convincing evidence, that he is "actually innocent" of his capital sentence—"actually innocent of the death penalty," in the parlance—again, a federal habeas court can overcome a procedural bar.

This Court has never expanded the exception beyond those two instances. Specifically, it has never extended the "actual innocence" exception to noncapital sentencing. Nor should it do so now.

Repeatedly, the Court has stated that the "miscarriage of justice" exception should be "extremely rare," *Schlup v. Delo*, 513 U.S. 298, 321 (1995), and "extraordinary," *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989). If the Court were to expand it to include noncapital sentencing errors, it would no longer be so.

"The ends of justice" do not support expanding the exception. The defendant in this case, Michael Wayne Haley, is not "actually innocent" in the usual sense of the words. He committed the underlying crime of theft. And he committed both predicate felonies, distribution of amphetamines and attempted robbery. The only "innocence" is the product of an undisputed technical legal error: under the terms of the statute, one of his felonies was committed three days too early.

Had Haley objected at trial, the error would have been corrected. Indeed, had he challenged his sentencing enhancement on direct appeal, the state courts may well have corrected the error. But he did not. Now, declining to excuse this procedural default in order to address a three-day discrepancy in dates—and not disturbing the state criminal conviction that was entered following a full and fair jury trial—would by no means be a "miscarriage of justice."

Extending the "actual innocence" exception to noncapital sentencing would dramatically expand the number of cases exempt from the strictures of procedural default. As the en banc Eighth Circuit observed in *Embrey v. Hershberger*, 131 F.3d 739, 741 (1997), "[a] legal claim that a substantive criminal statute has been wrongly applied to facts can, by resort to a rather unsophisticated play on words, always be converted into a complaint that the

relevant facts did not support a conviction and that therefore the defendant was 'actually innocent.'"

Extending the exception would also, for that subset of cases, effectively eliminate the "cause" requirement from "cause and prejudice" and would allow criminal defendants to retry their cases, based on the trial record alone and without any new evidence, after they procedurally defaulted their claims.

Moreover, even if the "actual innocence" exception were to extend to noncapital sentencing, Haley should still not prevail because "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera v. Collins*, 506 U.S. 390, 404 (1993). In this case, Haley presses "actual innocence" as a freestanding constitutional claim, rather than as a gateway to consideration of an alleged independent constitutional error.

In light of the strictures of federalism and the carefully circumscribed "actual innocence" exception to the procedural default rule that this Court has fashioned, the Court should not expand that exception to encompass claimed legal errors at noncapital sentencing. Rather, federal habeas courts should respect the final judgments of state criminal courts and the adequate and independent state ground of procedural default.

ARGUMENT

I. THE "ACTUAL INNOCENCE" EXCEPTION IS A JUDICIALLY CRAFTED "NARROW" GATEWAY AROUND THE PROCEDURAL DEFAULT RULE.

"This is a case about federalism." *Coleman v. Thompson*, 501 U.S. 722, 726 (1991). "It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus." *Id.*

In this case, there was indisputably error at sentencing. Equally indisputably, Haley procedurally defaulted on that error twice—at trial, and on direct appeal. As the Court explained in *Coleman*:

> "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Id.*, at 750.

Haley, however, does not advance any claim of cause and prejudice. Instead, he relies exclusively on the judicially created "miscarriage of justice" exception. But, because of the States' strong interests in finality, comity, and federalism, the Court has consistently limited the "actual innocence" exception to the rare and extraordinary circumstances where the State has convicted the wrong person of the crime or to the equally extraordinary cases involving imposition of the death penalty. The court of appeals's erroneous decision should be reversed.

A. Expanding the Scope of the Federal Writ of Habeas Corpus Would Exact a Heavy Price on the States' Interests in Finality, Comity, and Federalism.

Although "[t]he writ of habeas corpus indisputably holds an honored position in [the Court's] jurisprudence," *Engle v. Isaac*, 456 U.S. 107, 126 (1982), the Court has consistently recognized that the "Great Writ entails significant costs," *id.*, and the States' interests in both the finality of judgments and their rightful place in the federal system can be frustrated and undermined by the writ. *See McCleskey v. Zant*, 499 U.S. 467, 490-91 (1991); *Kuhlmann v. Wilson*, 477 U.S. 436, 452-54 (1986).

Liberal use of the writ breeds disrespect for the finality of convictions and "disparages the entire criminal justice system." *McCleskey*, 499 U.S., at 492. A prisoner's impression that he can always seek to overturn his conviction on habeas review "tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event." *Wainwright*, 433 U.S., at 89. And, the ready availability of the writ encourages litigants to withhold claims for manipulative purposes, *i.e.*, "sandbagging," and interferes with the States' ability to address and resolve claims while the facts are fresh. *See id.*; *McCleskey*, 499 U.S., at 491-92.

In the context of a federal attack on a state conviction, habeas review carries the added affront to the States' position in the federal system. "Our federal system recognizes the independent power of a State to articulate societal norms through criminal law." *McCleskey*, 499 U.S., at 491. The power of a State to pass laws means little, however, if the State cannot enforce them. *Id.* Further, as the primary authority for enforcing the criminal law, the

States "also hold the initial responsibility for vindicating constitutional rights." *Engle*, 456 U.S., at 128. Federal oversight and reexamination of state convictions "frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Id.* Accordingly, the States' vital interest in preserving their proper place in the federal system can be directly impugned by overly expansive federal use of the writ.

B. Use of the Writ Is Generally Limited To Considering Only Claimed Constitutional Violations That Were Properly Presented in the State System.

The Court has long recognized careful limits on the availability of federal habeas review. Of primary importance to the issue in this case is the basic habeas principle that habeas courts do not sit to review questions of fact, but only errors of constitutional dimension. *See, e.g.*, *Herrera*, 506 U.S., at 400-01 (citing *Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923); *Hyde v. Shine*, 199 U.S. 62, 84 (1905); *Ex parte Terry*, 128 U.S. 289, 305 (1888)). Accordingly, a habeas court may not reweigh the evidence or otherwise allow the habeas petitioner to relitigate his criminal trial, but must limit the scope of its review to "the question whether [the petitioner's] constitutional rights have been preserved." *Moore*, 261 U.S., at 87-88.

Furthermore, as a prerequisite to obtaining federal habeas relief, a habeas petitioner must first properly present all constitutional claims to the state court in the manner prescribed by the state's procedural rules. *Coleman*, 501 U.S., at 729-32. Failure to do so will result in

procedural default of the claims.[10] *Id.*, at 729-39. And, generally, the federal habeas courts will refuse to hear procedurally defaulted claims. *Id.*, at 729.

The procedural default doctrine directly facilitates the States' interests in finality of convictions and preservation of the proper balance between state and federal authority. By requiring habeas petitioners to comply with procedural rules, the doctrine vindicates the States' interest in finality and lessens "the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time." *McCleskey*, 499 U.S., at 493.

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[10] The procedural default doctrine is a specific application of the Court's rule that it will not review a question of federal law decided by a state court "if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman*, 501 U.S., at 729 (citations omitted). The doctrine applies whether the state-law ground is substantive or procedural. *Id.* Thus, when a state court refuses to consider a claim because the habeas petitioner failed to meet a state procedural requirement, an independent and adequate state-law reason supports the judgment, and the claim is procedurally barred. *Id.*, at 729-30; *see also Wainwright*, 433 U.S., at 88-91.

In the context of a direct appeal, the independent and adequate state-ground doctrine is jurisdictional because the Court has no power to review a state-law determination that is sufficient to support the judgment. *Coleman*, 501 U.S., at 729. The Court recognized in *Coleman* that the independent and adequate state-law rule applies in the habeas context because, if it did not, a federal district court could do on habeas what this Court could not do on direct review. *Id.*, at 730. That result would be unacceptable, the Court noted, because it would offer state prisoners whose custody was supported by an independent and adequate state ground an end run around the limits of the Court's jurisdiction and a means to undermine the State's interest in enforcing its laws. *Id.*, at 731.

The Court has recognized that federal habeas review of a procedurally defaulted claim exacts "particularly high" costs in terms of finality, comity, and federalism. *Engle*, 456 U.S., at 128 (citing *Wainwright*, 433 U.S., at 88-91). A habeas petitioner's failure to comply with a state procedural rule of trial deprives the state trial court of the opportunity to correct the defect and avoid the error in the first place. *Id.* Failure to comply with a State's appellate procedures likewise deprives the state appellate court of an opportunity to review and correct trial error prior to federal intervention. *See Murray v. Carrier*, 477 U.S. 478, 491 (1986). In both cases, issuance of the writ on a procedurally defaulted claim undercuts the State's ability to enforce its procedural rules and authorizes federal interference with a core state function. *See id.*; *Engle*, 456 U.S., at 129. Therefore, the Court has long held that, ordinarily, a federal habeas court may not reach the merits of a procedurally defaulted claim. *Sawyer v. Whitley*, 505 U.S. 333, 338 (1992) (citing *McCleskey*, 499 U.S., at 490-91); *Wainwright*, 433 U.S., at 88-91.

C. Habeas Review of Procedurally Defaulted Claims Is Limited to Those Circumstances Where a Habeas Petitioner Can Demonstrate Cause and Prejudice or "Actual Innocence."

The Court has allowed procedurally defaulted claims to be considered in federal court only where the habeas petitioner can show cause and prejudice, or in the extraordinary case of "actual innocence." *Sawyer*, 505 U.S., at 339.

1. A showing of cause and prejudice will excuse a procedural default.

The Court adopted the "cause and prejudice" standard for review of procedurally defaulted claims in *Wainwright*, 433 U.S., at 87. When a habeas petitioner can demonstrate cause for his default and prejudice as a result of the claimed constitutional error, the habeas court may bypass the procedural bar and address the merits of the constitutional claim. *Id.*; *see also Sawyer*, 505 U.S., at 338; *Carrier*, 477 U.S., at 496.

The cause and prejudice standard is a rigorous one. To demonstrate cause for a procedural default a petitioner must show that an objective factor external to the defense impeded compliance with the State's procedural rule. *Carrier*, 477 U.S., at 488. Examples cited by the Court include circumstances where a claim was not readily available to counsel, or when interference by state officials made compliance with the procedural rule impracticable. *Id.* Mere ignorance or inadvertence of counsel, however, is insufficient to show cause, unless it rises to the level of ineffective assistance of counsel under the Sixth Amendment. *Id.*, at 487; *see also Strickland v. Washington*, 466 U.S. 668, 690 (1984).

The prejudice prong of the cause and prejudice standard is also difficult to satisfy. A petitioner must show "'not merely that the errors at . . . trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" *Carrier*, 477 U.S., at 494 (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original)).

A habeas petitioner, therefore, has a difficult burden to obtain review of his procedurally defaulted constitutional

claim under the cause and prejudice standard. The Court expressly acknowledged this difficulty in *Carrier* and found it to be justified in light of the substantial state interests in enforcing procedural rules and being afforded the opportunity to hear and resolve claims prior to federal intervention. *See* 477 U.S., at 487.

2. In the absence of cause, a federal habeas court may review a procedurally defaulted constitutional claim only if the habeas petitioner can demonstrate "actual innocence."

The Court has recognized a limited class of procedurally defaulted claims that may receive federal habeas review even if the habeas petitioner cannot demonstrate cause for his procedural default. In the rare and extraordinary event that "the failure to hear the claim[ ] would constitute a 'miscarriage of justice,'" the federal habeas court may bypass the procedural bar and review the constitutional claim. *Sawyer*, 505 U.S., at 339. Justice O'Connor has described this process as "a kind of 'safety valve' for the 'extraordinary case' where a substantial claim of factual innocence is precluded by an inability to show cause." *Harris v. Reed*, 489 U.S. 255, 271 (1989) (O'Connor, J., concurring).

The Court elaborated on the miscarriage of justice or "actual innocence" exception in "a trio of 1986 decisions." *Sawyer*, 505 U.S., at 339 (referring to *Smith v. Murray*, 477 U.S. 527 (1986); *Carrier*, 477 U.S., at 478; *Kuhlmann*, 477 U.S., at 436). In *Kuhlmann*, a plurality of the Court explained that the "actual innocence" exception was derived from language in 28 U.S.C. §2244 that, prior to 1966, allowed denial of successive habeas claims without a hearing if the habeas court was "satisfied that the *ends of justice will not be served by such inquiry*." *Kuhlmann*, 477

U.S., at 448 (citing 28 U.S.C. §2244) (emphasis in original). Although Congress deleted that language from the statute in 1966, the *Kuhlmann* plurality chose to maintain the exception to allow consideration of successive claims in the limited circumstances where the habeas petitioner supplements his constitutional claim with a "colorable showing of factual innocence." *Id.*, at 454.

In *Carrier*, the second case in the trio, the Court held that the "actual innocence" exception applies to procedurally defaulted claims. 477 U.S., at 496. Continuing with its narrow application of the exception, the Court stated that the merits of a defaulted claim could be reached in an extraordinary case where "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.*

In *Smith*, the last of the three decisions, the Court acknowledged that the "actual innocence" exception may apply to allow consideration of a procedurally defaulted claim in the capital sentencing context. 477 U.S., at 537. In reaching this conclusion, the Court noted that "the concept of 'actual,' as distinct from 'legal,' innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense." *Id.* Nonetheless, the Court signaled in *Smith* that a procedurally defaulted constitutional claim may be considered upon the habeas petitioner's demonstration that he is "actually innocent" of the death penalty. *See id.* Although the Court did not enunciate the specific test to apply in such circumstances, the Court noted that the habeas petitioner in *Smith* had failed to show himself entitled to the exception because "the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false [illegible]." *Id.*, at 538.

Subsequently, in *Sawyer*, the Court developed the applicable standard for cases in which a habeas petitioner claims to be "actually innocent" of the death penalty. 505 U.S., at 348. The Court held that a habeas petitioner must demonstrate by "clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty" in order to justify federal habeas review of a procedurally defaulted constitutional claim.[11] *Id.*

Finally, in *Schlup v. Delo*, 513 U.S., at 326-27, the Court held that the more lenient *Carrier* standard[12]—rather than the more stringent *Sawyer* standard[13]—applies to a claim by a capital petitioner that he is "actually innocent" of the underlying crime.

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[11] The evidence considered by the habeas court is limited to the aggravating factors that made the defendant eligible for the death penalty, and not the additional mitigating evidence that may have been excluded as a result of a claimed constitutional error. *Sawyer*, 505 U.S., at 347. The Court specifically rejected the argument that consideration of mitigating evidence should be a factor in the standard because that "extension would mean that 'actual innocence' amounts to little more than what is already required to show 'prejudice,' a necessary showing for habeas relief for many constitutional errors." *Id.*, at 345. The Court went on to note that "[i]f a showing of actual innocence were reduced to actual prejudice, it would allow the evasion of the cause and prejudice standard. . . . In practical terms a petitioner would no longer have to show cause, contrary to our prior cases." *Id.*, at 345 n.13 (citing *McCleskey*, 499 U.S., at 494-95; *Carrier*, 477 U.S., at 493).

[12] To demonstrate "actual innocence" of a crime, a petitioner must show "a constitutional violation has probably resulted in the conviction of one who is actually innocent." 477 U.S., at 496.

[13] To demonstrate "actual innocence of the death penalty," a petitioner must show by "clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty." 505 U.S., at 348.

II. The Court Should Not Expand the "Actual Innocence" Exception to Encompass Claims of Noncapital Sentencing Error.

Repeatedly, the Court has emphasized how "narrow" and "extraordinary" the "actual innocence" exception is intended to be. *Schlup*, 513 U.S., at 321 (substantial claims of "actual innocence" are "extremely rare" and should remain the extraordinary case); *McCleskey*, 499 U.S., at 502 (same); *Dugger*, 489 U.S., at 410 n.6 (excuse of a procedural default under the "actual innocence" exception would happen only in an "extraordinary" case); *Kuhlmann*, 477 U.S., at 454 (habeas review should be granted "only in rare cases" when "the ends of justice so require"). It is a doctrine of last resort, which the Court created to justify the nullification of a state conviction or sentence in the exceedingly rare circumstances where an innocent person is convicted. *See Harris*, 489 U.S., at 271 (O'Connor, J., concurring) (noting that the "operative test" to review a procedurally defaulted claim is cause and prejudice, and that failure to demonstrate cause will result in the unavailability of federal habeas review *unless* the habeas petitioner can make a "substantial claim of factual innocence").

A. Haley Is Not "Actually Innocent," as That Term is Normally Used.

Mindful that exceptions to the procedural default rule exact a very high toll on the States' interests in enforcing judgments, the Court has made clear that "actual innocence" refers only to factual—not legal—innocence. *See, e.g.*, *McCleskey*, 499 U.S., at 502; *Dugger*, 489 U.S., at 410 n.6; *Kuhlmann*, 477 U.S., at 454. A habeas petitioner can demonstrate "legal innocence" simply by showing a constitutional violation that itself may require reversal. *See, e.g.*,

Caldwell v. Mississippi, 472 U.S. 320 (1985) (remarks by prosecutor in capital case that misinformed the jury as to the role of appellate review violated the Eighth Amendment). However, to demonstrate "actual innocence" sufficient to overcome a procedural default the petitioner must show more than a constitutional error, even when the verdict would have been different absent the error. *Dugger*, 489 U.S., at 410 n.6. The petitioner must demonstrate that he is innocent of the crime for which he was convicted. *See, e.g., Schlup*, 513 U.S., at 316; *Kuhlmann*, 477 U.S., at 454.

Under that standard, Haley is not "actually innocent." Haley concedes that he is guilty of the underlying crime in this case. He committed the theft that led to his present sentence, and he committed the felonies of delivery of amphetamines and attempted robbery that led to his sentence enhancement. He is, as a factual matter, a career offender with those convictions and numerous others.

To be sure, his second felony was committed three days too early. Thus, there was error: the enhancement does not fall within the literal terms of the statute. There is little doubt that, had Haley objected, he would not have been sentenced as a habitual offender. Likewise, had he raised the claim on direct appeal, his habitual offender conviction may well have been reversed. *See, e.g., Hernandez v. State*, 929 S.W.2d 11 (Tex. Crim. App. 1996).[14] But

[14] In *Hernandez*, a prisoner was convicted of possession of less than one gram of cocaine, a state jail felony. The indictment also alleged two prior felony convictions, delivery of a controlled substance and robbery, which became final before Hernandez's commission of the charged offense. Following his conviction, Hernandez pleaded "true" to the enhancement paragraphs and was assessed life in prison. On direct appeal, he claimed that his sentence was improperly enhanced. The Texas Court of Criminal Appeals reversed and remanded for new sentencing because—even though he had pleaded "true" to the enhancement paragraphs—the same robbery conviction had been used twice, to enhance the state jail felony up to a third-degree felony and then again to enhance it under the habitual offender statute.

Haley did not give either the state trial court or the state appellate courts the opportunity to correct the error.[15]

Haley committed the crime, and he committed the predicate felonies. His claim of "actual innocence," accordingly, is not based on the ordinary usage—"I didn't do it"—but rather on the legal technicality that the dates are three days off. Although there was legal error, refusing to excuse his two procedural defaults simply would not be a "miscarriage of justice."

B. Expanding the "Actual Innocence" Exception to Noncapital Sentencing Error Is Not Mandated by the "Ends of Justice."

Because the "actual innocence" exception is a judicially created rule drawn from the prior "ends of justice" language in 28 U.S.C. §2244, the scope of the "actual innocence" exception will ultimately turn on what the Court determines the "ends of justice" require. No sound equitable principle supports extending the exception to noncapital sentencing.

First, the equities are far less compelling than the circumstances in which the Court has already extended the exception. Actual innocence of the crime is, by definition, the most compelling instance of a miscarriage of

[15] The Texas Court of Criminal Appeals has repeatedly held that sufficiency of the evidence claims must be raised on direct appeal, not by collateral attack. *See, e.g., Ex Parte McWilliams*, 634 S.W.2d at 818 (collecting cases).

justice. And, "actual innocence of the death penalty," where the petitioner committed the underlying crime but did not in fact satisfy the aggravators necessary for the imposition of the death penalty, presents the equities of someone improperly sentenced to die.[16]

Second, an exception for noncapital sentencing errors would be subject to abuse, *see infra* 28-31, and therefore would exact even greater costs from the States in terms of federalism, comity, and finality. As the Court noted in *Schlup*, "[t]he threat to judicial resources, finality, and comity posed by claims of actual innocence [of the crime] is thus significantly less than that posed by claims relating only to sentencing." 513 U.S., at 324.

Third, the Court's prior "actual innocence" cases have carefully cabined the exception to actual innocence of the

[16] *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny are not inconsistent with this taxonomy. The Court, in the "actual innocence" context, has consistently drawn distinctions between "actual innocence" of the crime and "actual innocence" of the sentence (with different standards—*Carrier* and *Sawyer*—applicable to each) and between "actual innocence of the death penalty" (an exception to procedural default) and "actual innocence" of noncapital sentences (we submit, not an exception). Whether, and which, sentencing factors are properly framed as elements of the crime for *Apprendi* purposes is not relevant to the Court's discretionary judgment—pursuant to the "ends of justice"—of when to authorize a federal habeas court to set aside a state conviction notwithstanding the adequate and independent state ground of procedural default. And strong equitable reasons exist not to expand that exception to all procedurally defaulted claims of sentencing error.

Moreover, in this case, all of the facts necessary to apply the habitual offender enhancement were charged in the indictment, submitted to the jury, and found beyond a reasonable doubt. And, since the Texas habitual offender statute is aimed at recidivism as measured by prior convictions, those findings are properly deemed sentencing enhancements under *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

crime or of the death penalty. In *Sawyer*, for example, the Court drew a clear distinction between "actual innocence" in a noncapital case as compared to the capital sentencing context. 505 U.S., at 339-41. Noting that the "prototypical example of 'actual innocence' in a colloquial sense is the case where the State has convicted the wrong person of the crime," the Court stated that "[i]n the context of a noncapital case, the concept of 'actual innocence' is easy to grasp." *Id.*, at 341. Thus, the Court described its task as "striv[ing] to construct an analog to the simpler situation represented by the case of a noncapital defendant." *Id.*

As the six judges dissenting from denial of rehearing en banc in this case explained,

> "[t]he Tenth and Eighth Circuits inferred from this reasoning that the Supreme Court never intended the lower courts to extend the actual innocence exception to non-capital sentencing cases. Otherwise, why is the concept of actual innocence so 'easy to grasp' in the non-capital context? And why is a non-capital case a 'simpler situation'? In the Tenth Circuit's view, it is 'because it simply means the person didn't commit the crime.' The Eighth Circuit concluded that 'the most natural inference to draw from these observations on the Court's part is that' the actual innocence exception should not extend to non-capital sentencing." Pet. App. 26a-27a (quoting *Richards*, 5 F.3d, at 1371; *Embrey*, 131 F.3d, at 741).[17]

[17] The Fifth Circuit panel, in contrast, based its extension of the "actual innocence" exception to noncapital sentencing error on the general principle that the rules of procedural default do not apply differently depending on the nature of the penalty. Pet. App. 15a-16a (citing *Smith*, 477 U.S., at 538-39). *See also Murray v. Giarratano*, 492

The Court in *Sawyer* went on to note "[t]he present case requires us to further amplify the meaning of 'actual innocence' *in the setting of capital punishment*." 505 U.S., at 340 (emphasis added). The most logical implication of these precise statements is that the Court intended to expand—or amplify—the "actual innocence" exception from actual innocence of a crime to "actual innocence" of a sentence only in the unusual circumstances of capital cases.

C. Expanding the "Actual Innocence" Exception to Noncapital Sentencing Error Would Render the Exception Neither "Extremely Rare" Nor Extraordinary.

As the en banc Eighth Circuit noted in *Embrey*, "[a] legal claim that a substantive criminal statute has been wrongly applied to facts can, by resort to a rather unsophisticated play on words, always be converted into a

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U.S. 1, 9 (1989) (stating that habeas review of a death sentence does not require a heightened standard of review). The court of appeals reasoned that since, under *Smith* and *Sawyer*, the "actual innocence" exception applies to capital sentencing, and since the rules of procedural default do not depend on the "nature of the penalty," *Smith*, 477 U.S., at 537-38, the "actual innocence" exception should apply to noncapital sentencing as well. Pet. App. 14a-17a.

The Court's refusal to apply a different standard of review on federal habeas to death penalty cases is rooted in its conviction that "[t]he additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are . . . sufficient to assure the reliability of the process by which the death penalty is imposed." *Giarratano*, 492 U.S., at 10. Accordingly, the Court has refused to afford capital defendants extra leniency in complying with State procedural rules. *Id.*, at 9 (citing *Smith*, 477 U.S., at 538-39). The principle is yet a further example of the Court's reluctance to disturb State convictions on habeas review; it acts as a shield to the validity of State convictions, and should not be used as a sword to undermine the procedural default rule across the board.

complaint that the relevant facts did not support a conviction and that therefore the defendant was 'actually innocent.'" 131 F.3d, at 741. Thus, expansion of the exception to noncapital sentencing runs the risk of starting down a slippery slope toward the widespread undermining of the procedural default rule altogether.

Haley may respond that the facts of this case are unique—in that the error is objective and in that the State concedes error—and so the Court could fashion an exception that would not be subject to abuse. But, it is a near unalterable practical reality that, whenever the Court creates an exception to the rules protecting the finality of state convictions, that exception will grow in the hands of lower courts and creative defense lawyers.

And, the fact that the error is conceded here is not really a workable limitation. The fundamental premise behind the procedural default rule is that valid claims of legal error—not just state law error, as here, but violations of the U.S. Constitution—can be forever defaulted if the defendant fails to bring them to the attention of the state court. Indeed, the procedural default rule only really matters *when there is in fact error*; otherwise, the state conviction will not be disturbed in any event. Every procedural default case begins with the supposition that the defendant has a meritorious constitutional claim and examines, nevertheless, whether there is cause and prejudice for the failure to raise the claim in state court.[18]

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[18] *Cf. Schlup*, 513 U.S., at 316 ("Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred habeas claim.").

Therefore, the admitted error here is not qualitatively different from the premise of any claim of procedurally defaulted error.

Moreover, the peril of the floodgates being opened to widespread attacks on state sentences through "rather unsophisticated play[s] on words" is not merely hypothetical. An examination of some of the claims that have been brought in reported cases alleging "actual innocence" of noncapital sentences reveals the versatility of such an exception.

In *Embrey*, the petitioner was convicted of armed robbery in violation of the Federal Bank Robbery Act (FBRA), 18 U.S.C. §2113(a), (d), and kidnapping, in violation of the Federal Kidnapping Act, 18 U.S.C. §1201(a)(1). He was sentenced to two consecutive twenty-year terms, one for each conviction. 131 F.3d, at 739. The petitioner filed a successive petition under 28 U.S.C. §2255 in federal district court asserting that he was not eligible for sentencing under the Federal Kidnapping Act because Congress intended the FBRA to be a comprehensive statute that provided punishment for what he did to the exclusion of other federal statutes. *Id.*, at 740. The petitioner argued that because he was ineligible for sentencing under the Federal Kidnapping Act, he was "actually innocent" of the sentence he received under that statute, and therefore the court of appeals could reach the merits of his claim. *Id.*

The en banc Eighth Circuit court rejected his claim, stating that it was not "disposed to hold that in *Sawyer* the Supreme Court intended to allow petitioners successive collateral attacks on convictions and sentences by resorting to the simple expedient of reasserting an alleged legal error that resulted in a conviction that would not

have otherwise occurred, or in a sentence that would not have otherwise been imposed." If that were the case, noted the court, "then every sentence would be subject to an endless number of successive reviews." *Id.*, at 741.

In *United States v. Richards*, 5 F.3d 1369, 1371 (CA10 1993), Petitioner asserted, in a second §2255 motion, that his sentence was improperly calculated under the federal sentencing guidelines because the court included wastewater weight in computing the total weight of the amphetamines he was manufacturing. Thus, he argued, he was "actually innocent" of the sentence he had received. The court rejected that claim, holding that "[a] person cannot be actually innocent of a noncapital sentence." *Id.*, at 1371.

In *Reid v. Oklahoma*, 101 F.3d 628 (CA10 1996), Petitioner pleaded guilty in state court to numerous felony counts, and he was sentenced under the state's habitual offender statute. *Id.*, at 629. In his third habeas petition, Petitioner alleged his punishment was improperly enhanced because, among other things, his prior guilty pleas were unknowing and involuntary due to the contemporaneous use of the psychotropic drug Elavil and to ineffective assistance of counsel. The court of appeals rejected Petitioner's writ as abusive, refusing to review the petition under the "actual innocence" exception because Petitioner did not allege he was innocent of the felonies to which he pled guilty. *Id.*, at 630. Instead, Petitioner alleged only that he was innocent of the enhancement charge. *Id.* The court held that "because '[a] person cannot be actually innocent of a noncapital sentence,' petitioner's challenge to his recidivist enhancement does not fall within the potential scope of the miscarriage of justice exception." *Id.* (citing *Richards*, 5 F.3d, at 1371).

In *Sones v. Hargett*, 61 F.3d 410, 418-19 & n.16 (CA5 1995), the Fifth Circuit assumed, without deciding, that a Petitioner could be "actually innocent" of a noncapital sentence. Petitioner claimed he was "actually innocent" of habitual offender status because the prior convictions used to enhance his sentence were obtained without counsel. *Id.*, at 419. The court rejected Petitioner's claim of "actual innocence" because there was no evidence on the face of the commitment papers that would have led his lawyer to challenge the constitutionality of the prior convictions. *Id.*, at 420-21.

Finally, in *Pilchak v. Camper*, 935 F.2d 145 (CA8 1991),[19] Petitioner was convicted as a participant in a drug conspiracy and sentenced to life in prison. On habeas, she argued that she had been represented by a lawyer who was suffering from Alzheimer's disease and was convicted by a jury that was unconstitutionally selected. *Id.*, at 146. Because Petitioner failed to raise these complaints in the appropriate state forum, the State argued she was procedurally barred from raising them on federal habeas. *Id.*, at 147. The court of appeals held that the "actual innocence" exception has been "transported . . . into the sentencing phase of a trial." *Id.*, at 148. Although it did not explain how Petitioner was "actually innocent" of her sentence, the court upheld the granting of the writ, noting in a footnote that "elements of equal protection, substantive due process, and unusual punishment involved in the lifetime sentence" supported its decision. *Id.*, at 148 n.5.

[19] This case was effectively overruled by *Embrey*, 131 F.3d, at 740-41.

Examining just a few of these cases shows the potential breadth of the claims that can be characterized as being "actually innocent" of a noncapital sentence. And any exception to the procedural default rule that threatens to make "every sentence . . . subject to an endless number of successive reviews," *Embrey*, 131 F.3d, at 741, would, at a minimum, render the exception neither "extraordinary," *Dugger*, 489 U.S., at 410 n.6, nor "extremely rare," *Schlup*, 513 U.S., at 321.

D. Haley Produced No Newly Discovered Evidence of His "Innocence."

The "actual innocence" exception should not be available to Haley for the additional reason that he has produced no new evidence of his alleged "innocence." In *Schlup*, the Court stated, *"[w]ithout any new evidence of innocence*, even the existence of a concededly meritorious constitutional violation is not itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim." 513 U.S., at 316; (emphasis added); *see also id.*, at 324 (noting that "credible" claims of actual innocence require "new reliable evidence . . . not presented at trial").

Haley does not claim to have new information that was unavailable at the time of trial. Nor does he argue, because he cannot, that the jury was allowed to consider erroneous evidence at his sentencing hearing.[20] Haley instead argues simply that the jury misapplied Texas's habitual offender statute—that it made a mistake. This

[20] The documentation admitted into evidence to support Haley's sentence under the habitual offender statute accurately reflected that his convictions were not sequential. *See* 40-51.

information, however, was entirely available to Haley at trial. He could have raised it at trial or on direct appeal to correct the error. He did neither.

Haley's obligation to object and bring the error to the state court's attention serves two important purposes. First, it eliminates the potential for "sandbagging," for counsel intentionally or through neglect allowing erroneous charges to go forward (on the hope of acquittal) and then raising those errors afterwards to undo the sentence. Second, it prevents later courts—state courts or, especially, federal habeas courts—from second-guessing the decisions made at trial and considering claims never made to the trial court. Once the trial is complete, absent new probative evidence that was unavailable at trial, the trial record should not be reopened and reweighed in federal court.

Haley's claim that the jury misapplied Texas's habitual offender statute is not cognizable under the "actual innocence" exception. Haley's evidence is not new; he simply failed to raise it at trial or on direct appeal.

III. APPLICATION OF THE "ACTUAL INNOCENCE" EXCEPTION TO NONCAPITAL SENTENCING ERROR WOULD SUBVERT THE COURT'S CAUSE AND PREJUDICE STANDARD.

As a general matter, the "operative test" for determining whether a federal habeas court may review a procedurally defaulted claim is cause and prejudice. *Harris*, 489 U.S., at 271 (O'Connor, J., concurring). The "actual innocence" exception provides the "safety valve" for circumstances where a factually innocent prisoner cannot show cause. *Id.* Although each doctrine provides an independent avenue for a habeas petitioner to obtain review of a procedurally defaulted claim, the two doctrines do not operate

wholly independently from one another. Instead, the Court interprets the "actual innocence" exception with reference to the cause and prejudice test, and has refused to interpret "actual innocence" in a manner that would result in the degradation of the cause and prejudice test. *See Sawyer*, 505 U.S., at 345 n.13.

In particular, the Court refused in *Sawyer* to reduce the definition of "actual innocence" to mere actual prejudice, because "[i]n practical terms a petitioner would no longer have to show cause, contrary to [the Court's] prior cases." *Id.* Accordingly, a proper application of the "actual innocence" exception in any context must require more than a showing of actual prejudice in order to maintain the integrity of the cause and prejudice test. *See id.*

The court of appeals held, however, that Haley was "actually innocent" of habitual offender status based merely on a showing that the statute was improperly applied—*i.e.*, prejudice. Pet. App. 19a. The court of appeals's decision to apply the "actual innocence" exception in this case thus creates a ready means for petitioners to contest their state criminal sentences in federal court, without ever having brought the complaints in the proper state forum, simply by showing error that results in prejudice. That showing is a far cry from the rigorous cause and prejudice standard that the Court has erected to prevent such misuse of the writ and to protect the States' interests in preserving convictions and in enforcing procedural rules.

Tellingly, Haley did not even attempt to demonstrate cause and prejudice in the court of appeals, but simply

argued "actual innocence" to attack his sentence.[21] Of course, demonstrating that trial counsel was ineffective under *Strickland*, 466 U.S., at 668,[22] for failing to object to the enhancements is inherently more difficult than merely showing that the sentence was applied in error. It is not surprising that Haley chose the easier path and simply argued that he was "actually innocent" of his noncapital sentence.

But, by allowing Haley to abandon his ineffective assistance claim—which, given the clear error in the enhancement, conceivably could have prevailed—free of consequence, the court of appeals effectively eliminated the cause requirement in this case. Hence, Haley could surmount his procedural default merely by demonstrating prejudice, which he did.

[21] Although Haley asserted potential grounds for cause—ineffective assistance of trial counsel—in his federal habeas petition, those claims were denied, and Haley did not appeal them to the court of appeals. Pet. App. 12a (noting that Haley has not alleged "cause or actual prejudice"). Thus, Haley has waived any argument he might have made that his counsel at trial and on direct appeal was ineffective. *See Morley Constr. Co. v. Md. Cas. Co.*, 300 U.S. 185, 191 (1937) (holding that, in the absence of a cross-appeal, an appellee cannot "attack the [district court's] decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary").

[22] The Court established a difficult standard to demonstrate ineffective assistance in *Strickland*. A criminal defendant can establish ineffective assistance only by "showing that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable," 466 U.S., at 690, and that but for the errors, there is a reasonable probability that the results in the case would be different. *Id.*, at 694.

IV. THE COURT OF APPEALS'S DECISION ERRONEOUSLY ALLOWS HABEAS REVIEW OF A FREESTANDING CLAIM OF "ACTUAL INNOCENCE."

Absent extraordinary circumstances, a claim of actual innocence cannot state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. *Herrera*, 506 U.S. at 400. "[F]ederal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact." *Id.* The Court has long held that the focus on habeas review is not on the habeas petitioner's guilt or innocence, and it is not to relitigate state trials. *See, e.g., Barefoot v. Estelle*, 463 U.S. 880, 887 (1983); *Moore*, 261 U.S., at 87-88. Rather, a habeas court must be concerned solely with whether the petitioner's constitutional rights have been preserved. *See id*; *Ex parte Terry*, 128 U.S., at 305.

This guiding habeas principle is, in turn, rooted in the underlying concern for federalism and the States' interests in preserving the integrity of their criminal justice systems and the finality of their convictions. *See Herrera*, 506 U.S., at 401. A state criminal trial is a "decisive and portentous event" designed "within the limits of human fallibility" to determine "the question of guilt or innocence of one of its citizens." *Wainwright*, 433 U.S., at 90. Respect for that event demands that a conviction or sentence will not be disturbed on habeas review based on a mere claim of innocence, but only on the basis of a constitutional violation. *See Herrera*, 506 U.S., at 401. "Few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence." *Id.* (quoting *Kuhlmann*, 477 U.S., at 454).

Consequently, the Court has made clear that a bare claim of "actual innocence" will not support review of a procedurally defaulted claim. *Id.*, at 404. As the Court explained in *Herrera*,

> "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.*

In other words, a freestanding claim of "actual innocence" will not alone support a claim for habeas relief. *See id.*, at 404-05. Instead, the habeas petitioner must "supplement[ ] his constitutional claim with a colorable showing of factual innocence." *Id.*, at 404.

Haley cannot meet this standard. He does not seek to demonstrate that he is "actually innocent" to support the habeas court's review of an independent constitutional violation.[23] Rather, Haley's claim that he is "actually innocent" of habitual offender status is identical to his underlying and procedurally barred claim that the evidence was insufficient to support his sentence under the habitual offender statute.

Nor can Haley claim that his *Jackson v. Virginia*, 443 U.S. 307 (1979), sufficiency-of-the-evidence claim is the independent constitutional claim that might allow him to

[23] Of course, as discussed previously, Haley is not "actually innocent." Factually speaking, he has been convicted of numerous crimes, five of which are implicated in this case. Instead, he is only "legally innocent" of habitual offender status in Texas because the two sentencing convictions were not sequential: the second crime was committed three days before his first became final. *See* J.A. 40-51; Tex. Pen. Code §12.42(a)(2).

go through the "actual innocence gateway." Haley never challenged the sufficiency of the evidence supporting the enhancements, at trial or on appeal. Hence, that claim is procedurally defaulted, twice over.

The Court in *Jackson* expressly contemplated that sufficiency claims could be procedurally defaulted:

> "[A]ssuming that state remedies have been exhausted and that no independent and adequate state ground stands as a bar, it follows that [a constitutional sufficiency of the evidence] claim is cognizable in a federal habeas corpus proceeding." *Id.*, at 321 (internal citations omitted) (citing, *inter alia*, *Wainwright*, 433 U.S., at 72.).

Yet, if Haley is right that the identical grounds can serve both as the basis for his "actual innocence" exception and as his underlying sufficiency of the evidence claim, then procedural defaults on sufficiency claims will have been rendered impossible. Any time there is insufficient evidence of a sentence, on Haley's circular reasoning, that error will suffice both to show "actual innocence" (eliminating the Court's longstanding requirement of cause and prejudice) and to provide the underlying constitutional relief. Thus, any incentive for defendants to bring sufficiency claims to the attention of state courts will have been dramatically reduced.

Under *Herrera*, the court of appeals should have rejected Haley's "actual innocence" claim as an inappropriate attempt to obtain habeas review of a claim of pure innocence. In holding to the contrary, the court of appeals has sanctioned the disruption of any state sentence entered pursuant to a habitual offender statute, irrespective of an applicable procedural bar, based on a freestanding

claim of "innocence."[24] Under this decision, a habeas petitioner need not demonstrate that a constitutional violation tainted his trial proceedings. Rather, all the petitioner needs to demonstrate is that he is "innocent" of the sentence because it was entered in legal error.

For example, in *Higgins v. Smith*, 991 F.2d 440 (CA8 1993), Petitioner asserted in his habeas petition that he was given a sentence in excess of that permitted by state law. Prior to his sentencing, the Missouri Legislature had reduced the applicable maximum sentence, but the sentencing court mistakenly did not apply the amendment. *Id.*, at 441. The federal district court granted Petitioner habeas relief.

On appeal, the State asserted a procedural bar; Petitioner countered that the habeas court could reach his claim under the "actual innocence" exception. The Eighth Circuit rejected that argument because Petitioner could point to no constitutional violation that resulted in his conviction or sentence. Rather, Petitioner's complaint was merely that the sentencing court misapplied state law. *Id.* Thus, the court noted,

[24] For this reason, the Second and Fourth Circuits' holdings extending the "actual innocence" exception to noncapital sentencing error are equally erroneous. *See Spence* 219 F.3d, at 171-72 (holding that the "actual innocence" exception applies to allow review of procedurally defaulted claim of insufficient evidence to support sentence with no claim of independent constitutional error); *United States v. Mikalajunas*, 186 F.3d, at 495 n.4 (rejecting United States's argument that "actual innocence" exception applies only in conjunction with independent constitutional violation, stating that court had, in *United States v. Maybeck*, 23 F.3d 888 (CA4 1994), excused a procedural default based on "actual innocence" exception involving misapplication of habitual offender statute, not a constitutional error).

> "if we were to hold that the mistake complained of here was a constitutional one, say, because it violates due process to incarcerate a person beyond his term, or offends the prohibition against cruel and unusual punishment to do so, then there would be no effective boundaries to habeas inquiries." *Id.*, at 442.

Additionally, observing that "it is not unconstitutional for a state court (or any other) to make a mistake, particularly if the relevant matter was never properly argued to it," the court of appeals reversed the district court's decision to grant habeas relief. *Id.*

Accordingly, the Fifth Circuit's decision erroneously allows a freestanding "actual innocence" claim to serve as the basis for habeas relief, in direct contradiction not only to *Herrera*, but also to the underlying, basic principle that habeas relief is not available to address a claim of "innocence" absent a constitutional defect at trial. *See Herrera*, 506 U.S., at 400-01 (citing *Moore*, 261 U.S., at 87-88; *Hyde*, 199 U.S. at 84; *Ex parte Terry*, 128 U.S., at 80). The court of appeals's erroneous judgment should be reversed.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

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DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Petitioner,

v.

MICHAEL WAYNE HALEY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

Whether the "actual innocence" exception to the procedural default rule concerning federal habeas corpus claims should apply to noncapital sentencing error.

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STATEMENT OF THE CASE

As the State of Texas has repeatedly conceded,[1] Michael Haley was sentenced to sixteen years and six months in the penitentiary for stealing a calculator, even though he was eligible to receive, at most, a sentence of two years in a state jail. Nevertheless, Petitioner Doug Dretke insists that a federal habeas court should not be allowed to review the merits of Mr. Haley's procedurally defaulted, and manifestly meritorious, due process claim.[2]

Mr. Haley was charged by indictment with the state jail felony offense of theft. J.A. 8-10; Tex. Penal Code Ann. § 31.03(e)(4)(D) (Vernon 2003). The range of punishment for a state jail felony is 180 days to two years in a state jail. Tex. Penal Code Ann. § 12.35(a) (Vernon 2003). However, the indictment also alleged that Mr. Haley was previously convicted of delivery of amphetamines and robbery, and that the delivery conviction "became final prior to the commission of [the robbery]."[3] J.A. 9. If proved

---

[1] *See, e.g.*, J.A. 140 (conceding in the District Court that "Haley is correct in his assertion that the enhancement paragraphs as alleged in the indictment do not satisfy section 12.42(a)(2) of the Texas Penal Code"); Petition for Rehearing *En Banc* 6 (conceding that "Haley's conviction was improperly enhanced under state law because his prior convictions were not sequential"); Petition for *Certiorari* 4-5 (advising this Court that "the State has since conceded, [the enhancement] allegation was incorrect. . . . Thus, there is no dispute that Haley's punishment was improperly enhanced under the statute"); Pet. Br. 4 (admitting that "the State has since conceded . . . [the enhancement] allegation was incorrect").

[2] Petitioner Doug Dretke (hereinafter "Dretke") is the Director of the Texas Department of Criminal Justice, Institutional Division.

[3] The judgment admitted during the punishment phase of the trial reflects a conviction for attempted robbery rather than robbery as alleged. J.A. 43.

beyond a reasonable doubt, as required by Texas law, these prior sequential felony convictions would increase the statutory minimum sentence to two years and the statutory maximum sentence to twenty years in the penitentiary.[4] Tex. Penal Code Ann. §§ 12.42(a)(2), 12.33 (Vernon 2003).

During the punishment phase of the trial, the prosecutor offered without objection, and the trial court admitted, a "penitentiary pack" containing evidence of the two prior felony convictions. J.A. 16-17. This evidence conclusively established that, contrary to the indictment's allegation, Mr. Haley's prior convictions were not sequential, and thus did not support an enhanced sentence. J.A. 40-51. However, neither the trial court nor Mr. Haley's court-appointed attorney recognized the prosecutor's error. As a result, the issue was submitted to the jury. J.A. 22-23, 52. During closing argument, the prosecutor argued that the evidence supported the enhancement allegations and called upon the jury to find the allegations true and to sentence Mr. Haley near the top of the enhanced range of punishment. J.A. 23-27, 29-32.

Despite the absence of any evidence that the prior convictions were sequential, the jury found the enhancement allegations true and assessed punishment at sixteen years and six months in the penitentiary. J.A. 33-34, 61-62, 63-67. The trial court imposed that sentence, which

[4] Prior convictions are "sequential" only where "the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final." Tex. Penal Code Ann. § 12.42(a)(2) (Vernon 2003).

Dretke admits is more than eight times the statutory maximum for which Mr. Haley was actually eligible.

After trial, Mr. Haley's court-appointed lawyer moved to withdraw from continued representation based on a "conflict of interest." J.A. 11, 68-69. Although the trial court granted this motion, J.A. 70, the same lawyer represented Mr. Haley on appeal.[5] J.A. 71. Counsel did not challenge the sufficiency of the evidence to support the enhancements, and the Texas Court of Appeals affirmed. J.A. 72-83.

Mr. Haley filed a *pro se* application for a writ of habeas corpus in state court alleging, *inter alia*, that he was denied due process because the evidence was insufficient to support a finding that his prior convictions were sequential, J.A. 85, 87-89, and asserting a related ineffective assistance of counsel claim. J.A. 93-94. Instead of conceding error and agreeing to re-sentence him, however, the prosecutor argued that Mr. Haley had procedurally defaulted his sufficiency claim and asserted that Mr. Haley's lawyer had provided effective assistance. J.A. 104-106. The Texas Court of Criminal Appeals denied the application for the reasons given by the prosecutor. J.A. 107-109.

Mr. Haley, still *pro se*, timely filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on August 24, 2000.[6] J.A. 110. In his petition, Mr. Haley presented

[5] The record does not explain why the lawyer continued to represent Mr. Haley even though the trial court granted his motion to withdraw.

[6] Based on the filing date of this petition, it is governed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132,

(Continued on following page)

the same claims he raised in his state writ, including, among others, that he was denied due process because the evidence was insufficient to support a finding that his prior convictions were sequential, J.A. 118, 124, and that his lawyer rendered constitutionally ineffective assistance related to the improper enhancement of his sentence. J.A. 119, 126.

In response, the Director of the Texas Department of Criminal Justice, Institutional Division conceded that Mr. Haley's prior convictions were not sequential, but argued that the due process claim was procedurally defaulted, J.A. 179-184, and that the ineffective assistance of counsel claim should be denied on the merits. J.A. 146-149. The District Court granted relief on the due process claim, Pet. App. 37a, and therefore did not reach the related ineffective assistance of counsel claim. Pet. App. 37a (adopting Pet. App. 51a).[7] The final judgment provided that the State of Texas had ninety days to re-sentence Mr. Haley without the improper enhancement, and that if it failed to do so, his conviction would be reversed. Pet. App. 30a.

The Director then appealed. J.A. 5. The Fifth Circuit held that the due process claim was procedurally defaulted and that Mr. Haley did not allege cause and prejudice.[8]

110 Stat. 1214 (1996) (AEDPA). *Lindh v. Murphy*, 521 U.S. 320, 326 (1997).

[7] "Because relief is to be granted regarding the erroneous enhancement, the Court will not address Haley's claims concerning the performance of counsel on this points [sic]." Pet. App. 51a.

[8] Mr. Haley asserted both cause and prejudice in his brief to the Fifth Circuit. Petitioner's Rebuttal to Respondent's Brief 2-4. This directly contradicts Dretke's statement that "Haley did not even

(Continued on following page)

However, the Court of Appeals also held that the fundamental miscarriage of justice exception permitted review of this claim because Mr. Haley was actually innocent of the sentence. Pet. App. 12a. On the merits, the Fifth Circuit held that Mr. Haley was denied due process because the evidence was insufficient as a matter of law. Pet. App. 18a-20a.

The Director then sought rehearing *en banc*. J.A. 6. Mr. Haley, proceeding for the first time with the assistance of counsel, argued that the panel decision was correct, and advised the Court of Appeals that alternative grounds existed for affirming because he had alleged cause and prejudice. Petitioner-Appellee's Response to Petition for Rehearing *En Banc* 15, n.14. The Court of Appeals denied the petition to rehear this case *en banc*. J.A. 6; Pet. App. 21a-29a.

The mandate issued on April 25, 2003, J.A. 6, and the State of Texas did not re-sentence Mr. Haley. Instead, his conviction was reversed, and the Director released him from custody. Respondent's Advisory to the Court.[9] Although Mr. Haley has already served more than six years – three times the statutory maximum sentence – the Director advised the District Court that he intends to re-incarcerate Mr. Haley for the remaining ten years of his admittedly erroneous sentence if this Court reverses the

attempt to demonstrate cause and prejudice in the court of appeals, but simply argued 'actual innocence' to attack his sentence." Pet. Br. 33-34.

[9] The Texas Attorney General filed this Advisory in the District Court on July 28, 2003.

Fifth Circuit's decision. *Id.* This Court then granted *certiorari*. J.A. 7.

SUMMARY OF THE ARGUMENT

Although federal courts typically are precluded from reaching the merits of procedurally defaulted claims absent a showing of cause and prejudice, this Court has consistently held that such claims may be reached if the failure to do so would result in a fundamental miscarriage of justice. A fundamental miscarriage of justice is present when a habeas petitioner is able to show that he or she is "actually innocent" of the crime or the sentence. The principles that underlie this well-established exception apply irrespective of whether the petitioner is subject to a capital or noncapital sentence.

Contrary to the indictment's allegation, Mr. Haley's prior convictions were not sequential. In fact, the evidence conclusively establishes, and Dretke concedes, that he was eligible for, at most, a sentence of up to two years in a state jail. As such, he is actually innocent of the facts required by Texas substantive law to subject him to the sixteen year and six month prison sentence he received.

The Fifth Circuit properly held that this sentence – more than eight times the maximum authorized by law – was fundamentally unjust, and it accordingly reached the merits of Mr. Haley's procedurally defaulted *Jackson v. Virginia*, 443 U.S. 307 (1979), claim. In doing so, the Fifth Circuit joined the Second and Fourth Circuits in holding that the fundamental miscarriage of justice exception permits review of procedurally defaulted claims when the petitioner shows "actual innocence" of facts necessary to

render one minimally eligible for a noncapital sentence. The Court of Appeals applied the test announced in *Sawyer v. Whitley*, 505 U.S. 333 (1992), because it correctly recognized that the nature of the petitioner's penalty does not affect the principles underlying this exception.

Applying *Sawyer*'s eligibility test to noncapital sentences furthers, rather than compromises, the interests guiding the Court's procedural default doctrine. By reaching the merits of valid but procedurally defaulted constitutional claims by the rare petitioner who can show by clear and convincing evidence that he or she is actually innocent of the conduct required to make him or her minimally eligible for an increase in the statutory maximum of a noncapital sentence, federal courts vindicate state legislatures' policy decisions about the appropriate punishment for a given offense. Further, permitting review in these narrow circumstances does not undermine the integrity of state court proceedings protected by the procedural default rules, because it creates no incentive for defendants to "sandbag" by withholding claims for federal habeas. A defendant has no reason to hide his or her true innocence at trial in the hopes of obtaining a later, more favorable, re-trial. Further, permitting review in cases where this exception applies will not unduly burden the states because the only relief will be re-sentencing. These conclusions are consistent with this Court's decisions and with Congress' post-*Sawyer* amendments to the federal habeas statute which left intact the principle that actual innocence of one's sentence excuses a procedural default.

This Court's fundamental miscarriage of justice exception was not narrowed by the decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Apprendi* addressed a

substantive constitutional rule, which has equal application in capital and noncapital cases, not the inequitable nature of confining a petitioner beyond the statutory maximum sentence permitted by state law. If relevant at all, *Apprendi* supports the Fifth Circuit's decision because factual innocence of the required sequence of the prior convictions, which increases the statutory maximum sentence, and Texas' requirement that sequence be proved to the jury beyond a reasonable doubt, means that Mr. Haley is actually innocent of not only his sentence, but also the enhanced offense of habitual offender theft.

Sawyer's eligibility test, which requires a federal habeas court to determine whether the petitioner received a sentence for which he or she was statutorily ineligible, is both narrow in application and easy to administer. The experience of several circuit courts over the course of a decade demonstrates that this exception will be invoked only rarely and may be determined with relative ease. As such, the exception imposes little burden upon the states' legitimate interests in finality, comity and federalism.

The Court of Appeals appropriately concluded that the District Court could reach the merits of Mr. Haley's procedurally defaulted *Jackson v. Virginia*, 443 U.S. 307 (1979), claim. Neither this Court nor the relevant federal habeas statutes require that a claim of actual innocence of a sentence must rely exclusively on "new" evidence in order to reach a procedurally defaulted claim. In fact, there is no justification in this Court's decisions or Congressional policy for limiting a federal habeas court's ability to consider evidence which conclusively demonstrates a petitioner's innocence of a crime or sentence in a first federal habeas petition.

The Fifth Circuit was also correct in concluding that Mr. Haley was entitled to relief under *Jackson*. Here, the prosecution was required by Texas law to prove to the jury beyond a reasonable doubt that Mr. Haley's prior convictions were sequential, but, as the Court found, it failed to provide any evidence to support that fact. The fact that the same evidence establishes the fundamental miscarriage of justice and the underlying constitutional claim is of no import and does not convert *Sawyer*'s gateway claim into a free standing constitutional claim.

ARGUMENT

I. Federal Habeas Courts May Review Procedurally Defaulted Constitutional Claims Where The Petitioner Can Demonstrate By Clear And Convincing Evidence That He Or She Is Innocent Of Conduct Making Him Or Her Minimally Eligible For An Increase In The Statutory Maximum Sentence

A. A Core Purpose Of Habeas Is Ensuring That Persons Are Not Subject To Sentences For Which They Are Statutorily Ineligible

The writ of habeas corpus has functioned for centuries as the "bulwark against convictions that violate fundamental fairness." *Engle v. Isaac*, 456 U.S. 107, 126 (1982). Recognizing the costs associated with federal habeas corpus review, *McCleskey v. Zant*, 499 U.S. 467, 490-91 (1991), this Court has held that a federal habeas court may not ordinarily reach the merits of a procedurally defaulted claim absent a showing of cause and prejudice. *Wainwright v. Sykes*, 433 U.S. 72, 84-85 (1977). At the same time, the Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy that

must operate to correct a fundamental miscarriage of justice. *Schlup v. Delo*, 513 U.S. 298, 319-21 (1995). For this reason, the Court has consistently held that "'[i]n appropriate cases,' the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.'" *Murray v. Carrier*, 477 U.S. 478, 495 (1986) (quoting *Engle*, 456 U.S. at 135); *Schlup*, 513 U.S. at 321; *see also Sunal v. Large*, 332 U.S. 174, 189 (1947) (Rutledge, J., dissenting).[10]

The Court has linked this "fundamental miscarriage of justice exception," *Schlup*, 513 U.S. at 321, to "actual innocence" in order to accommodate "the systemic interests in finality, comity, and conservation of judicial resources, and the overriding individual interest in doing justice in the extraordinary case." *Id.* at 322 (internal quotation marks and citations omitted). The Court has used innocence as a touchstone, *Harris v. Reed*, 489 U.S. 255, 271 (1989) (O'Connor, J., concurring), because "a sufficient showing of actual innocence" is the "ultimate equity on the prisoner's side." *Withrow v. Williams*, 507 U.S. 680, 700 (1993) (O'Connor, J., concurring in part and

[10] As Justice Rutledge stated over fifty years ago:

> The writ should be available whenever there clearly has been a fundamental miscarriage of justice for which no other adequate remedy is presently available. Beside executing its great object, which is the preservation of personal liberty and assurance against its wrongful deprivation, considerations of economy and judicial time and procedures, important as they undoubtedly are, become comparatively insignificant.

Sunal, 332 U.S. at 189 (Rutledge, J., dissenting).

dissenting in part); *see also id.* at 718 (Scalia, J., concurring in part and dissenting in part) (same); *Brecht v. Abrahamson*, 507 U.S. 619, 652 (1993) (O'Connor, J., dissenting) (describing actual innocence as "the ultimate equity on the prisoner's side").

The fundamental miscarriage of justice exception applies to instances of factual innocence of an offense and factual innocence of the pre-requisites for a sentence. In *Carrier*, the Court held that the fundamental miscarriage of justice exception permits a federal habeas court to reach a procedurally defaulted claim, absent a showing of cause and prejudice, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent" of the crime. *Carrier*, 477 U.S. at 496. In a companion case, the Court simultaneously recognized that this exception could apply in the context of one who is guilty of an offense, but actually innocent of a fact that would render him or her eligible for a capital sentence. *See, e.g., Smith v. Murray*, 477 U.S. 527, 537 (1986). The Court later set forth the standard for evaluating whether a petitioner is "actually innocent" of a capital sentence in *Sawyer v. Whitley*, 505 U.S. 333, 348-49 (1992). The *Sawyer* test requires a petitioner to show by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found him or her eligible for the death penalty under the applicable state law. *Id.* Once that test is met, a federal habeas court may reach the merits of a defaulted constitutional claim without a showing of cause and prejudice. *Id.* at 338-39.

Smith and *Sawyer* are not unprecedented extensions of the fundamental miscarriage of justice exception. Rather, their focus – detention without legal authority – reflects one of the core concerns that the writ was

historically intended to address.[11] As noted by Judge Henry J. Friendly in his influential article advocating that habeas review be limited to innocent petitioners, "[b]roadly speaking, the original sphere for collateral attack on a conviction was where the tribunal lacked jurisdiction either in the usual sense . . . *or because the sentence was one the court could not lawfully impose.*" Henry J. Friendly, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgments," 38 U. CHI. L. REV. 142, 151 (1970) (footnotes omitted) (emphasis added); *accord* Paul M. Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 HARV. L. REV. 441, 466-67 (1963); *see, e.g., Ex parte Lange*, 18 Wall. (85 U.S.) 163 (1873) (granting relief from an unlawful sentence); *Ex parte Snow*, 120 U.S. 274 (1887) (same); *Ex parte Nielsen*, 131 U.S. 176 (1889) (same).

B. The Principles Supporting This Court's Holding In *Sawyer* Apply With Equal Force In The Context Of Those Actually Innocent Of The Conduct Making Them Minimally Eligible For A Particular Noncapital Sentence

1. Imposition Of The Death Penalty Does Not Require Different Application Of This Court's Habeas Doctrine

In the decision on review, the Fifth Circuit joined the Second and Fourth Circuits in holding that "actual

[11] This focus is consistent with the recognition that the habeas inquiry does not involve review of the state court's judgment, but rather the lawfulness of the petitioner's custody *simpliciter*. *Coleman v. Thompson*, 501 U.S. 722, 730 (1991).

innocence" of a noncapital sentence provides a gateway to reach the merits of an otherwise procedurally defaulted constitutional claim. Pet. App. 12a; *see, e.g., Spence v. Superintendent, Great Meadow Correctional Facility*, 219 F.3d 162, 170-71 (CA2 2000); *United States v. Mikalajunas*, 186 F.3d 490, 494-95 (CA4 1999). The Fifth Circuit correctly concluded that the fundamental miscarriage of justice exception does not depend on the nature of the penalty the state imposes. Pet. App. 15a-16a.

There is, in fact, no principled reason to limit *Sawyer* to capital sentences. "[T]he availability of [the] actual innocence exception depends not on the 'nature of the penalty' the state imposes, but on whether the constitutional error 'undermined the accuracy of the guilt or sentencing determination.'" *Spence*, 219 F.3d at 170-71 (quoting *Smith*, 477 U.S. at 538-39). Except for the obvious difference in the severity of the sentence, there is no principled difference between a defendant who is innocent of the acts required to make him or her eligible for a death sentence, and a defendant who is innocent of the acts required to confine him or her beyond the legislatively established statutory maximum. *See United States v. Maybeck*, 23 F.3d 888, 893 (CA4 1994). In either case, the defendant faces the same result if the claim is not heard; he or she will be subjected to a punishment for which he or she is not eligible. *Id.* "Because the harshness of the sentence does not affect the habeas analysis and the ultimate issue, the justice of the incarceration, is the same, there is no reason why the actual innocence exception should not apply to noncapital sentencing procedures." *Spence*, 219 F.3d at 171.

This Court has consistently recognized that the same rules for reviewing constitutional claims apply without

regard to the nature of the petitioner's sentence. In the specific context at issue here, the Court has expressly "refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus."[12] *Murray v. Giarratano*, 492 U.S. 1, 9 (1989).

> In *Smith v. Murray*, a case involving federal habeas corpus, this Court unequivocally rejected "the suggestion that the principles [governing procedural default] of *Wainwright v. Sykes* apply differently depending on the nature of the penalty a State imposes for the violation of its criminal laws."

Id. (quoting *Smith*, 477 U.S. at 538) (internal citations omitted).

The Court has made clear in several contexts that, while it requires additional procedural safeguards in the trial of capital offenses, *Giarratano*, 492 U.S. at 8-9, no difference is warranted in reviewing constitutional errors following trial. The Court uses the same harmless-error standard in capital and noncapital cases, *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988), applies the same *Teague* non-retroactivity rule in capital and noncapital cases, *Graham v. Collins*, 506 U.S. 461, 467 (1993); *Butler v.*

[12] The Court's procedural default doctrine has developed in both capital and noncapital cases. Three of the Court's seminal cases dealing with procedural defaults, the cause and prejudice standard and the fundamental miscarriage of justice exception are noncapital cases, and the rules announced in them have been applied without reservation in capital cases. *See, e.g., Wainwright*, 433 U.S. at 74; *Engle*, 456 U.S. at 113; *Carrier*, 477 U.S. at 482; *Coleman*, 501 U.S. at 749-55 (applying *Wainwright*, *Engle* and *Carrier* in a capital case).

McKellar, 494 U.S. 407, 412 (1990), and applies the same ineffective assistance of counsel test in capital and noncapital cases. *See, e.g., Hill v. Lockhart*, 474 U.S. 52, 57-58 (1985) (applying *Strickland* standard, announced in a capital case, in a noncapital case); *see also Giarratano*, 492 U.S. at 10, n.5 (holding that capital petitioners, like noncapital petitioners, are not constitutionally entitled to counsel in post-conviction proceedings).

Finally, there is no basis for distinguishing *Sawyer* on the ground that death is somehow more permanent or final than incarceration. Just as a capital sentence permanently and finally deprives a person of his or her life, so too does a noncapital sentence permanently and finally take away a period of one's liberty. It is self-evident that just as a person's life cannot be returned, the liberty taken from one who is unjustly confined can never be restored either. *See Embrey v. Hershberger*, 131 F.3d 739, 745 (CA8 1997) (en banc) ("Surely no one can claim that requiring an individual to serve a twenty-year illegal sentence is not a miscarriage of justice.") (Lay, J., dissenting); *see also* Note, "The Rhetoric of Difference and the Legitimacy of Capital Punishment," 114 HARV. L. REV. 1599, 1621 (2001) (The "distinctive aspect of death, its finality, is also questionable – not because death is not final, but because most other punishments are also").

The present case demonstrates the permanence and finality of the injustice inflicted on a habeas petitioner who is factually ineligible for his or her sentence. Michael Haley spent six years in prison – three times the maximum authorized by Texas law – based on a factually false indictment. Mr. Haley can never get back those years. According to Dretke, however, Mr. Haley should lose ten more years of his liberty if this Court were to accept his

view – ten years he concedes are not authorized under Texas law. *See* Note, *supra*, at 1621 ("A wrongfully convicted man [or woman] who spends twenty years in prison before the discovery of the error has lost twenty years. There is no way to revoke any portion of a sentence, be it a death sentence or a term of years, once it has already been served").

2. The Reasons Advanced By The Seventh, Eighth And Tenth Circuits To Limit *Sawyer* To Capital Cases Do Not Justify That Rule And Rest On A Misreading Of This Court's Holding

Dretke bases his claim that *Sawyer* does not apply to noncapital cases in part on two circuit court decisions. Pet. Br. 25-26 (*citing Embrey*, 131 F.3d at 741, and *United States v. Richards*, 5 F.3d 1369, 1371 (CA10 1993)). In *Embrey* and *Richards*, the Eighth and Tenth Circuits respectively read one passage in this Court's *Sawyer* decision as implying that this Court meant to exclude noncapital sentences from the fundamental miscarriage of justice exception. Specifically, they refer to the Court's statement that "actual innocence" usually refers to innocence of an offense and "[i]n the context of a noncapital case, the concept of 'actual innocence' is easy to grasp." Pet. Br. 25 (quoting *Sawyer*, 505 U.S. at 341). Based on this language, these lower courts inferred that *Sawyer* meant to preclude review of defaulted claims presented by petitioners who are "actually innocent" of their noncapital sentences.

Contrary to Dretke's suggestion, this Court's statements in *Sawyer* do not support, let alone dictate, the conclusion that the fundamental miscarriage of justice

exception is limited to capital sentences. Rather, read in context, the Court did not draw a conclusion about all noncapital cases; it was merely contrasting the claim of actual innocence of a sentence in that case with the more typical claim in a noncapital case that the petitioner is innocent of all criminal conduct. This reading is consistent with the principles announced in the decision itself (which are not based on the uniqueness of capital punishment) and with this Court's consistent determination that "death is not different" for purposes of enforcing habeas rules. *See*, *supra*, I.B.1.

Notably, the other decision relied upon by Dretke as supporting his position actually rejected this strained reading of *Sawyer*. In *Hope v. United States*, 108 F.3d 119 (CA7 1997), the Seventh Circuit did not rely on this passage from *Sawyer* or reject on that basis its prior holding in *Mills v. Jordan*, 979 F.2d 1273, 1278 (CA7 1992), that the fundamental miscarriage of justice exception reaches noncapital sentences. *Hope*, 108 F.3d at 119-20. Instead, *Hope* held that a petitioner in a subsequent writ cannot rely on *Sawyer*'s fundamental miscarriage of justice exception because AEDPA's subsequent writ provision refers only to innocence of the "offense." *Id.* Given its reliance on an AEDPA provision dealing exclusively with subsequent petitions and the lack of a similar provision applicable to procedurally defaulted claims, *Hope* plainly does not apply in this case. *See*, *infra*, I.C.3.

C. Applying *Sawyer*'s Eligibility Test To Noncapital Sentences Exceeding The Statutory Maximum Is Consistent Both With This Court's Holding In *Sawyer*, And Advancing The Interests In Comity And Federalism Recognized By This Court And Congress

1. Comity And Federalism Are Advanced By Respecting State Sentencing Schemes And Enforcing Their Requirements

Applying *Sawyer*'s eligibility test to noncapital sentences furthers, rather than compromises, the interests guiding the Court's procedural default doctrine. Texas' substantive law specifying the maximum sentences for which defendants are eligible deserves respect and vindication in federal court. *See Ewing v. California*, 538 U.S. 11, ___, 123 S.Ct. 1179, 1187 (2003) (plurality) (noting that sentencing schemes are a matter of policy to be made by state legislatures). Adopting the position urged by Dretke grants respect to Texas' procedural rules at the expense of the Texas Legislature's substantive policy judgments concerning the maximum punishment that should be meted out in particular circumstances.

In adopting the Penal Code, the Texas Legislature established "a system of prohibitions, penalties, and correction measures to deal with conduct that unjustifiably and inexcusably causes or threatens harm." Tex. Penal Code Ann. § 1.02 (Vernon 2003). It determined that a defendant, such as Mr. Haley, should be subject to an enhanced sentence only if he or she had been previously convicted of two felony offenses *and* the first became final prior to the commission of the second. *See* Tex. Penal Code Ann. § 1.02(6) (Vernon 2003) (stating that one of the

objectives of the Penal Code is "to define the scope of state interest in law enforcement against specific offenses").

The requirements that there be two prior convictions and that those convictions also be sequential is not uniform throughout Texas' habitual offender statutes. For instance, one prior felony conviction (other than a state jail felony conviction) results in an enhanced maximum sentence for all felony offenses except state jail felonies which do not involve deadly weapons. *See, e.g.*, Tex. Penal Code Ann. § 12.42(a)(3), (b), (c) (Vernon 2003) (requiring only one prior conviction). Texas law also provides for an increased statutory maximum sentence upon conviction of a state jail felony with two prior *non-sequential* state jail felony convictions. *See, e.g.*, Tex. Penal Code Ann. § 12.42(a)(1) (Vernon 2003) (requiring only two prior convictions, regardless of sequence).

In carefully calibrating its habitual offender scheme, the Texas Legislature plainly concluded that although the statutory maximum sentence in some circumstances should be increased on proof of only one prior felony conviction, it should not be increased by a single prior felony conviction when the instant offense is of the relatively minor type committed by Mr. Haley. Further, the Legislature concluded that the type of prior offenses committed by Mr. Haley should only result in the increase of the statutory maximum sentence if they were sequential, in contrast to its judgment that in other instances the prior convictions need not be sequential.[13]

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[13] The requirement of sequence is not unique to Texas law. *See, e.g.*, 720 Ill. Comp. Stat. Ann. 5/33B-1 (West 2003); Md. Code Ann., Crim.

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In adopting its sentencing scheme, the Texas Legislature made a careful policy judgment which is entitled to respect – that persons who do not use weapons, who are accused of only a state jail felony, and who committed their second prior non-state jail felony offense before they had been convicted of a prior offense, should not be subjected to confinement up to twenty years. Texas' policy judgment is entitled to respect not only because it is the state legislature's judgment, but also because it draws a manifestly sensible set of distinctions. Offenders who have not used a weapon and who have been convicted of the lowest level of felony offense recognized by the state should not be subjected to a sentence of up to twenty years unless they have previously demonstrated a resistance to rehabilitation. Defendants who commit a second offense before they are ever convicted have not been judged, sentenced or punished at the time of that offense, and thus have not demonstrated any predisposition against rehabilitation as of the time of that offense.

At Mr. Haley's trial, the prosecutor undermined the policy judgment of the Texas Legislature by seeking a sentence which was not authorized for defendants such as Mr. Haley. The indictment falsely alleged that Mr. Haley was eligible for an enhanced sentence based on his prior convictions, J.A. 8-9, when in fact the Texas Legislature had determined that defendants such as Mr. Haley should be subject to enhanced punishment only if their prior convictions were sequential. The prosecutor capitalized on this error during closing argument by incorrectly stating

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Law § 14-101 (2002); Va. Code Ann. § 19.2-297.1 (Michie 2000); Wis. Stat. Ann. § 939.62 (West 1996 & Supp. 2002).

that the evidence was sufficient to support an enhanced sentence, J.A. 24-26, and by calling upon the jury to sentence Mr. Haley to a term of imprisonment for which he was not eligible. J.A. 32.

Despite being advised – and forthrightly conceding – that the sentence the prosecutor sought was not proper in this case, the Texas Attorney General, on behalf of Dretke, similarly refuses to vindicate substantive Texas law. Dretke has notified the District Court that he intends to re-incarcerate Mr. Haley if this Court reverses the judgment of the Court of Appeals. Respondent's Advisory to the Court (advising "[i]n the event that the Supreme Court grants the Director's petition, and reverses this Court's judgment, the Director intends to reincarcerate Haley for the remainder of his original sentence"). To now bar the federal court from considering Mr. Haley's concededly meritorious claims out of "respect" for state law would stand the notion of comity on its head, and would have the perverse effect of perpetuating a violation of Texas law in the name of respecting it.

Dretke has not argued – because he cannot – that there is a legitimate interest in continuing to confine a petitioner that he admits is serving a sentence which he or she was ineligible to receive under state law. He merely argues that he should be able to continue the admittedly unlawful sentence in the name of federalism. But, federalism is not advanced by confining an individual who is innocent of his or her sentence under state law. On the contrary, it is advanced by ensuring that state prosecutors do not disregard state law and the federal constitution.

2. The Interests That Underlie This Court's Decisions Limiting Federal Habeas Review Of Procedurally Defaulted Claims Are Not Jeopardized By Applying The Fundamental Miscarriage Of Justice Exception To A Person Who Is Innocent Of Any Conduct Making Him Or Her Eligible For An Increase In The Statutory Maximum Sentence

In *Wainwright*, this Court adopted the cause and prejudice standard for reaching the merits of procedurally defaulted claims in part to discourage petitioners from withholding valid claims at trial for a tactical purpose. *See* 433 U.S. at 89. This risk of "sandbagging" – that defendants "may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off" – is not present in cases involving actual innocence of a sentence. A defendant has no rational incentive to withhold information at the punishment phase regarding his or her statutory ineligibility for a particular sentence. Mr. Haley's situation illustrates this point. Mr. Haley had no tactical reason to expose himself to a maximum twenty-year sentence when he was actually eligible for only a two-year maximum. Indeed, despite the fact that he promptly filed his state writ application and timely filed his federal petition within the one year statute of limitations, he had already served four years more than the statutory two-year maximum sentence by the time this case was decided.

The other concerns supporting limited review of procedurally defaulted claims, including the costs associated with a re-trial of a defendant, are likewise not

present where the petitioner received a sentence for which he or she was statutorily ineligible. In such a circumstance, the petitioner's sole remedy is re-sentencing. Thus, there is no danger that a guilty person would be freed because of faded memories, lost evidence or unavailable witnesses.

3. Applying *Sawyer*'s Miscarriage Of Justice Standard In The Rare Circumstances Where A Petitioner Is Able To Establish Actual Innocence Of His Or Her Sentence Is Also Consistent With Congressional Policy As Reflected In AEDPA

Congress' actions following the decision in *Sawyer* further confirm that its eligibility test applies regardless of whether the petitioner's sentence is capital or noncapital. Four years after this Court's decision in *Sawyer*, Congress extensively amended the federal habeas statute as part of AEDPA. At the time it enacted AEDPA, Congress was legislating not only against the background of *Sawyer*'s eligibility test, but also *Smith*'s clear statement that the Court's procedural default doctrine should not vary according to the nature of the petitioner's punishment. Nevertheless, Congress chose not to alter this Court's rules concerning the fundamental miscarriage of justice standard for procedurally defaulted claims or the application of procedural default rules in noncapital cases. This omission is particularly significant in light of the fact that Congress addressed procedurally defaulted claims in capital cases from opt-in states and made it more difficult to obtain merits review of a successive and abusive petition.

Despite ample opportunity to do so, Congress did not address procedural defaults in noncapital cases in AEDPA. *See* R. Hertz & J. Liebman, *Federal Habeas Corpus Practice and Procedure* (4th ed. 2001) § 26.1; *see also Ortiz v. Stewart*, 149 F.3d 923, 931 (CA9 1998). It was, however, aware of these standards and did address the circumstances in which a federal habeas court may reach the merits of a procedurally defaulted claim in a capital case from a qualified opt-in state.[14] 28 U.S.C. § 2264. As a matter of statutory interpretation, this demonstrates that Congress intended to leave intact this Court's fundamental miscarriage of justice exception as it pertains to procedural defaults. *See Custis v. United States*, 511 U.S. 485, 491-92 (1994) (inferring Congressional intent based on statutory authority in one statute which is not present in another statute); *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"); *Russello v. United States*, 464 U.S. 16, 23 (1983) (same).

Congress' intent is further reflected in its determination not to modify the standards for reviewing procedural

[14] These petitioners' procedurally defaulted claims may be considered only where the failure to raise the claims is the result of state action in violation of the Constitution or laws of the United States, the result of this Court's recognition of a new federal right that is made retroactively applicable, or based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim in state or federal post-conviction review. 28 U.S.C. § 2264(a).

defaults in noncapital cases at the same time that it amended the requirements for obtaining review of a second or successive petition. 28 U.S.C. § 2244(b). For instance, Section 2244(b)(2) provides that abusive petitions, *see Schlup*, 513 U.S. at 319, n.34 (defining "abusive" petitions), shall be dismissed unless the claim relies on a new rule of constitutional law made retroactive or the factual predicate for the claim could not have been discovered previously, and the facts underlying the claim if proven would "establish by clear and convincing evidence that, but for a constitutional violation, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2). Section 2244(b)(2) confirms that Congress was aware of *Sawyer*'s actual innocence eligibility formulation as well as its standard of proof, and that where it chose to do so, Congress knew how to alter the miscarriage of justice exception. *See Williams v. Taylor*, 529 U.S. 420, 433 (2000) (holding that "in requiring that prisoners who have not been diligent satisfy § 2254(e)(2)'s provisions rather than show cause and prejudice, and in eliminating a freestanding 'miscarriage of justice' exception, Congress raised the bar *Keeney* [*v. Tamayo-Reyes*, 504 U.S. 1 (1992),] imposed on prisoners who were not diligent in state-court proceedings"); *see also Custis*, 511 U.S. at 491-92.[15]

[15] Moreover, other aspects of AEDPA further assure that states' finality interests are protected notwithstanding the existence of *Sawyer*'s fundamental miscarriage of justice test. Mr. Haley filed his petition within the one-year statute of limitations, *see* 28 U.S.C. § 2244(d), which, until passage of AEDPA in 1996, did not exist. *See, e.g., Brecht*, 507 U.S. at 637; *Vasquez v. Hillery*, 474 U.S. 254, 264 (1986). This strict statute of limitations addresses any lingering finality

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D. This Court's Decision In *Apprendi v. New Jersey* Did Not Alter The Holding In *Sawyer*, Or Modify Its Principles But, If Anything, Supports The Fifth Circuit's Decision

The State of Illinois, *et al.*,[16] as well as the Solicitor General,[17] argue that this Court misspoke in *Sawyer* when it concluded that punishing one who is "innocent of a sentence" constitutes a miscarriage of justice. In their view, this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), "clarifies" that – because death eligibility criteria are elements of an enhanced offense – *Sawyer* does not concern innocence of a *sentence*, but only innocence of an enhanced offense. Ill., *et al.* Br. 8-10; S.G. Br. 26-28. Thus, they urge this Court to re-interpret *Sawyer* to abandon the concept that one can be innocent of a sentence and to eliminate a decade of jurisprudence applying the fundamental miscarriage of justice exception to persons who are factually ineligible for their sentence.

As an initial matter, *Apprendi* did not concern the standard for establishing a fundamental miscarriage of justice in habeas corpus, and did not purport to address the issue. In *Apprendi*, the Court granted *certiorari* on a direct appeal to resolve "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum

concerns about applying *Sawyer* to procedurally defaulted claims in noncapital cases.

[16] The States of Illinois, Alabama, Arizona, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, Oregon, South Dakota, Utah and Wyoming filed an *amicus* brief, which will be cited hereinafter as "Ill., *et al.* Br."

[17] The Solicitor General filed an *amicus* brief on behalf of the United States, which will be cited hereinafter as "S.G. Br."

prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." 530 U.S. at 469. The Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Thus, the Court invalidated the New Jersey statute permitting "a jury to convict a defendant of a second-degree offense [with a maximum sentence of 10 years imprisonment] based on its finding beyond a reasonable doubt that he unlawfully possessed a prohibited weapon" and allowing "a judge to impose punishment identical to that New Jersey provides for crimes of the first degree [with a maximum sentence of 20 years imprisonment], based upon the judge's finding, by a preponderance of the evidence, that the defendant's 'purpose' for unlawfully possessing the weapon was 'to intimidate' his victim on the basis of a particular characteristic the victim possessed." *Id.* at 491 (internal citation omitted).

Apprendi establishes only that facts which increase the statutory maximum sentence, like facts required to determine guilt, must be proved to a jury beyond a reasonable doubt as a matter of substantive constitutional law. It does not address whether, and in what context, a sentence constitutes a miscarriage of justice such that a federal habeas court should be permitted to reach a procedurally defaulted claim absent a showing of cause and prejudice.[18]

[18] Further, *Apprendi* does not justify any differentiation in the application of a constitutional rule, or an equitable rule, based on the severity of the punishment. *Apprendi*'s holding has equal force in

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Nothing in *Apprendi* suggests that *amici*'s reinterpretation of *Sawyer* is warranted. *Sawyer* made clear that the fundamental miscarriage of justice exception was intended to permit review where the petitioner is ineligible for a sentence. The Court expressly contrasted innocence of a sentence with the "prototypical example of 'actual innocence' . . . where the State has convicted the wrong person of the crime," 505 U.S. at 340, and rejected the position that a petitioner should be entitled to the benefit of the exception only if he or she could negate an element of the offense itself. *Id.* at 343.

The Court's subsequent treatment of *Sawyer* demonstrates that the fundamental miscarriage of justice exception is applicable not only to those who did not commit the crime, but also to those who are not eligible for the sentence. *See Schlup*, 513 U.S. at 326 (distinguishing *Sawyer* on the ground that "[t]hough formulated as an element of the offense . . . , the arson *functioned essentially as a sentence enhancer*") (emphasis added). In *Schlup*, for instance, the Court addressed whether the *Sawyer* standard or the less demanding *Carrier* standard for the fundamental miscarriage of justice exception should apply when the petitioner alleges actual innocence of the crime. *Schlup*, 513 U.S. at 326-27. In analyzing the comparative balance of the equities between the two situations, the Court stated that "the *Sawyer* standard was fashioned to

capital and noncapital cases. *See, e.g., Ring v. Arizona*, 536 U.S. 584, 609 (2002).

reflect the relative importance of a claim of an *erroneous sentence*. . . ."[19] *Id.* at 325 (emphasis added).

Finally, *Calderon v. Thompson*, 523 U.S. 538, 560 (1998), makes plain that this Court intended *Sawyer* to permit review of the claims of a petitioner who is actually innocent of his or her sentence.

> The *Sawyer* standard has a *broader* application than is at first apparent. As the Court explained in *Schlup*, when a capital petitioner challenges his underlying capital murder conviction on the basis of an element that "function[s] essentially as a sentence enhancer," the *Sawyer* "clear and convincing" standard applies to the claim. Thus, to the extent a capital petitioner claims he did not kill the victim, the *Schlup* "more likely than not" standard applies. To the extent a capital petitioner contests the special circumstances rendering him eligible for the death penalty, the *Sawyer* "clear and convincing" standard applies, irrespective of whether the special circumstances are elements of the offense . . . or, as here, mere sentencing enhancers.

Id. (emphasis added; internal citations omitted).

Although consideration of this issue is unnecessary for this Court to affirm, *Apprendi* supports, rather than

[19] Similarly, the Court noted "[n]or do we believe that confining *Sawyer*'s more rigorous standard to claims involving eligibility for the sentence of death is anomalous. Our recognition of the significant difference between the injustice that results from an erroneous conviction and the injustice that results from an *erroneous sentence* is reflected in our decisions that permit reduced procedural protections at sentencing." *Schlup*, 513 U.S. at 326, n.44 (emphasis added).

undermines, the Fifth Circuit's holding. Under *Apprendi*, Mr. Haley is actually innocent of not only his sentence, but also the enhanced offense of theft by a habitual offender, *see Sattazahn v. Pennsylvania*, 537 U.S. 101, 112 (2003) (plurality), because the proof of the element of sequence, which increased the statutory maximum ten-fold, is wholly lacking. *Tomlin v. State*, 722 S.W.2d 702, 705 (Tex. Crim. App. 1987) ("The sequence of events must be proved [beyond a reasonable doubt] as follows: (1) the first conviction becomes final; (2) the offense leading to a later conviction is committed; (3) the later conviction becomes final; (4) the offense for which defendant presently stands accused is committed").

To avoid this conclusion, *amici* rely on this Court's statement in *Apprendi*, 530 U.S. at 490, that prior convictions are not elements for Sixth Amendment purposes, and on this Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Ill., *et al.* Br. 9-10; S.G. Br. 21. Neither offers refuge. The Court in *Apprendi* did not hold that prior convictions which raise the statutory maximum sentence are not elements; rather it expressly noted that it was not called upon to decide that question. *See Apprendi*, 530 U.S. at 490 (noting that the Court need not revisit *Almendarez-Torres* because Apprendi did not contest its validity).

Almendarez-Torres does not support *amici*'s position because it is distinguishable and inapplicable. The statute at issue in *Almendarez-Torres* only required proof of the "fact" of a prior conviction. 523 U.S. at 229-31. The Texas statute, on the other hand, requires proof beyond a reasonable doubt that the first prior conviction became final before the offense underlying the second prior conviction was committed. *Tomlin v. State*, 722 S.W.2d at 705. Thus,

sequence is an element of the enhanced offense and innocence of it constitutes actual innocence of the offense. Additionally, *Almendarez-Torres* is inapplicable because, even if *Apprendi* does not require the recidivist allegations to be accorded Sixth Amendment protection, they function as elements under Texas law because the prosecutor is required to prove them beyond a reasonable doubt to the jury. *Tomlin v. State*, 722 S.W.2d at 705. If anything, the lack of evidence supporting the sequence element means that Mr. Haley is actually innocent of the enhanced offense and that, as a result, review is available under the fundamental miscarriage of justice exception.

E. The Nature Of The *Sawyer* Test And The More Than A Decade Of Experience In The Circuit Courts Demonstrates That The Test Is Easy To Administer In Noncapital Cases And That It Will Not Open A "Floodgate" Of Unmeritorious Or Cumbersome Claims

1. The *Sawyer* Eligibility Test Functions Equally Well In The Noncapital Context And Need Not Be Modified

The Fifth Circuit, like the Fourth Circuit, held that the fundamental miscarriage of justice exception "applies to noncapital sentencing procedures involving a career or habitual felony offender." Pet. App. 13a; *accord Mikalajunas*, 186 F.3d at 495. The operative fact is not the habitual offender enhancement, although often relevant, but rather that the sentence is outside the statutory maximum. *See Sawyer*, 505 U.S. at 348 (focusing on statutory eligibility). Thus, a petitioner demonstrates a fundamental miscarriage of justice where he or she: (1) proves by clear and convincing evidence that he or she is

actually innocent of a fact that was essential to the sentence, such that no reasonable juror would have found against the petitioner; and (2) shows that the court's reliance on that false fact did not merely enhance the sentence, but increased it beyond the statutory maximum for which the defendant was actually eligible.

The Fifth Circuit properly applied the *Sawyer* eligibility test. Mr. Haley conclusively established that he received a sentence eight times above the statutory maximum because he did not commit the attempted robbery before his delivery convictions became final. Dretke concedes that contrary to the allegations in the indictment, Mr. Haley was not eligible for a sentence exceeding two years in a state jail. Pet. Br. 4; Pet. App. 23a.

This constitutes actual – not legal – innocence. "Actual innocence" refers to being factually innocent of the basis for one's sentence whether that is an element of the crime or an element of the sentence. *See Sawyer*, 505 U.S. at 345. It is beyond dispute that the allegation that the convictions were sequential was factually untrue. Thus, it is irrelevant that one of the additional eligibility criteria, namely two convictions, was factually accurate. "Actual innocence" does not require innocence in the broad sense of having led a blameless life. *Schlup*, 513 U.S. at 328 & n.47.

2. Applying The *Sawyer* Standard To Sentences That Exceed The Statutory Maximum Is Consistent With This Court's Prior Precedents And Can Be Accomplished With Little Administrative Effort

The *Sawyer* eligibility test requires more than simply an error in the calculation of a sentence; instead, it requires imposition of a sentence that could not be imposed lawfully because it exceeds the statutory maximum. Limiting this exception to such sentences is consistent with this Court's substantive constitutional and habeas doctrines, and may be implemented with relative ease to assure that the fundamental miscarriage of justice exception will remain narrow.

The Court has recognized that whether a fact increases the statutory maximum sentence determines whether the constitutional rights to a jury trial and proof beyond a reasonable doubt are implicated. *See, e.g., Apprendi*, 530 U.S. at 490. Further, the Court has not required additional constitutional safeguards when a factor is used merely to adjust sentences within a statutory range. *See, e.g., Harris v. United States*, 536 U.S. 545, 565 (2002). The distinction between factors that increase a sentence beyond the statutory maximum and factors that affect sentencing discretion is thus already established in existing law.

Similarly, this Court has recognized the limited availability of habeas relief for a sentence that is not above the statutory maximum. For instance, in *Townsend v. Burke*, 334 U.S. 736, 741 (1948), the Court noted that if a sentence is within the limits set by statute, its severity alone would not be grounds for habeas relief. *See also United States v. Pridgeon*, 153 U.S. 48, 63 (1894) (holding

that only the portion of the sentence that is excessive is subject to habeas attack). The courts of appeals too have precluded habeas relief where a sentence is not outside the statutory maximum. *See, e.g., Williams v. Duckworth*, 738 F.2d 828, 831 (CA7 1984), *cert. denied*, 469 U.S. 1229 (1985) (affirming the denial of a habeas petition because "[a]s a general rule, a federal court will not review state sentencing determinations that fall within statutory limits"); *Mira v. Marshall*, 806 F.2d 636, 639 (CA6 1986) (same).

In *Sawyer*, this Court adopted an eligibility test because it is narrow and can be determined with "relative ease" by federal habeas courts. 505 U.S. at 345-46. This eligibility test is similarly narrow when applied to non-capital sentences and can be applied with relative ease. "An individual is either eligible or not eligible to receive a particular sentence." *Embrey v. Hershberger*, 131 F.3d 739, 744 (CA8 1997) (Lay, J., dissenting). As the Court noted in *Caspari v. Bohlen*, 510 U.S. 383, 397 (1994), for example, "[p]ersistent-offender status is a fact objectively ascertainable on the basis of readily available evidence. Either a defendant has the requisite number of prior convictions or he does not."

Sawyer's eligibility test is, if anything, less difficult to apply to noncapital sentences than capital sentences. For instance, determining whether a petitioner's prior convictions are sequential – the eligibility criteria at issue – is more objective and less difficult to ascertain than whether the petitioner constitutes a future danger, which the prosecution must prove in order to subject a Texas defendant to a death sentence. *Compare* Tex. Penal Code Ann. § 12.42(a)(2) (Vernon 2003) *with* Tex. Crim. Proc. Code Ann. art. 37.071 § 2(b)(1) (Vernon 2003).

Similarly, one of the eligibility criteria under Louisiana law for imposition of the death penalty – that "[t]he offense was committed in an especially heinous, atrocious or cruel manner,"[20] La. C.Cr.P. Art. 905.3, 905.4 (West 2003) – is less objective and more difficult to perceive than the criteria under Louisiana law for habitual offender sentence – the number, nature and length of the prior convictions, and, in some instances, the age of the victim. La. R.S. 15:529.1 (West 2003).[21]

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[20] The Court has upheld the use of "especially heinous, cruel, or depraved" behavior as an aggravating circumstance, *Walton v. Arizona*, 497 U.S. 639, 652-56 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002), as well as the slightly different "especially heinous, atrocious, or cruel." *See, e.g., Proffitt v. Florida*, 428 U.S. 242, 255-56 (1976).

[21] The federal sentencing regime highlights the same point. Under federal law, a defendant's drug sentence can be enhanced by prior convictions. *See, e.g.*, 21 U.S.C. § 841(b)(1)(A) (providing, in part, that a person convicted of possessing with intent to distribute 50 grams or more of cocaine base shall be sentenced to life if he has two or more prior convictions for felony drug offenses). Additionally, a federal defendant can be sentenced to death for a drug related murder. *See, e.g.*, 21 U.S.C. § 848(e) (providing that "any person engaging in or working in furtherance of . . . an offense punishable under section 841(b)(1)(A) . . . who intentionally kills . . . may be sentenced to death"). Determining the eligibility criteria for the former is much more objective, and less difficult, that determining the eligibility criteria for imposition of the death penalty. *Cf.* 21 U.S.C. § 848(n)(12) (providing that one of the statutory aggravating factors is that "[t]he defendant committed the offense in an especially heinous, cruel or depraved manner in that it involved torture or serious physical abuse to the victim"); 18 U.S.C. § 3592(c)(6) (same).

3. The Experience Of Numerous Lower Federal Courts Demonstrates That Application Of *Sawyer* To Noncapital Cases Has Not Opened The "Floodgates" To Unmeritorious Or Burdensome Claims

Applying *Sawyer* in noncapital cases will not result in a flood of actual innocence claims. Given the "clear and convincing" standard of proof required to establish ineligibility, the relatively limited number of cases in which sentences are actually enhanced beyond the statutory maximum and the limited category of facts which may increase the statutory maximum sentence without constituting an element of an enhanced offense per *Apprendi*, the likelihood of many cases being brought that raise this claim is negligible. Indeed, the experience of the circuits that have applied the miscarriage of justice standard to noncapital sentences confirms that these claims are rare and extraordinary.

The *Sawyer* eligibility test permits review of otherwise barred claims on the merits only when the habeas petitioner shows by clear and convincing evidence that he or she is statutorily ineligible for the sentence. This exception will be rare because most, if not all, factors which raise the statutory maximum sentence are elements under *Apprendi* – thus, implicating "actual innocence" of the crime – and very few petitioners receive a sentence above the statutory maximum for which they are actually eligible. Thus, the Solicitor General's discussion of United States Sentencing Guidelines statistics misses the mark; a Guideline error could never constitute a fundamental miscarriage of justice.

Dretke identifies a number of cases where the petitioner sought to rely on the fundamental miscarriage of

justice exception based on "actual innocence" of a noncapital sentence in support of his proposition that expressly recognizing *Sawyer*'s application to noncapital sentences will result in a flood of claims. Pet. Br. 28-30. These cases do not support Dretke's contention; instead, they highlight the narrowness of the exception. For instance, the petitioner in *United States v. Richards*, 5 F.3d 1369, 1371 (CA10 1993) (arguing that drug quantity had been incorrectly measured and thus petitioner was "actually innocent" of sentence for certain amount of amphetamines), would not be able to establish "actual innocence" because he received a sentence for which he was statutorily eligible.

Additionally, the petitioners in *Reid v. Oklahoma*, 101 F.3d 628, 629 (CA10 1996) (arguing "actual innocence" because the guilty pleas for the prior convictions were involuntary due to psychotropic drug use), and *Sones v. Hargett*, 61 F.3d 410, 418-19 (CA5 1995) (arguing actual innocence of habitual offender status on the ground that petitioner did not have counsel on the prior convictions), could not show "actual innocence" of their noncapital sentences. The only fact in these cases that triggered eligibility for the enhanced sentences were the existence of prior convictions. The actual innocence inquiry, thus, does not extend to the validity of the prior convictions.[22]

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[22] This approach is consistent with eligibility determinations in other contexts. For instance, in *Custis v. United States*, 511 U.S. 485, 490-92 (1994), this Court held that absent statutory authority a defendant cannot collaterally attack prior convictions used for sentencing purposes under the Armed Career Criminal Act.

Contrary to the concerns expressed by the Eighth Circuit in *Embrey*, 131 F.3d at 741, and relied upon by Dretke, Pet. Br. 26-27, experience with the fundamental miscarriage of justice exception in noncapital cases establishes that applying *Sawyer* will not result in a flood of actual innocence claims. Prior to the decision below, the Fifth Circuit had assumed since 1992 that actual innocence applied to noncapital sentences. *See, e.g., Smith v. Collins*, 977 F.2d 951, 959 (CA5 1992). However, in the ten years between *Smith* and this case, there are only two published Fifth Circuit opinions concerning actual innocence of a noncapital sentence and none where the petitioner prevailed.[23] Similarly, there have been exceptionally few decisions from the Fourth Circuit, where the exception has been applied since 1994,[24] *see United States v. Maybeck*, 23 F.3d 888, 893 (CA4 1994), and the Second Circuit where the exception has included actual innocence of noncapital sentences since 2000.[25] Finally, the exception

[23] *See, e.g., Sones*, 61 F.3d at 413; *Jackson v. Anderson*, 112 F.3d 823, 830 (CA5 1997) (Garza, E., J., dissenting) (arguing in dissent that the petitioner established actual innocence of a habitual offender sentence). Respondent was unable to locate any unpublished appellate opinions or District Court opinions discussing this exception which predate this case.

[24] Respondent has been able to identify only five decisions through Westlaw research. *See, e.g., United States v. Mikalajunas*, 186 F.3d 490 (CA4 1999); *Alston v. United States*, 235 F. Supp. 2d 477 (D.S.C. 2002); *United States v. Payne*, 990 F. Supp. 412 (D. Md. 1998); *Mobley v. United States*, 974 F. Supp. 553 (E.D. Vir. 1997); *Berger v. United States*, 867 F. Supp. 424 (S.D. W. Va. 1994); *Patterson v. United States*, 2002 WL 32079233 (D.S.C. 2002). In these cases, the petitioner obtained relief in only *Payne* and *Mobley*.

[25] Respondent has been able to identify only five decisions through Westlaw research. *See, e.g., Spence*, 219 F.3d at 171; *Poindexter v. Nash*,

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was rarely invoked in the Seventh and Eighth Circuits while available.[26]

II. The Fifth Circuit Correctly Reached The Merits And Granted Relief On Mr. Haley's Procedurally Defaulted *Jackson v. Virginia* Claim Because New Evidence Is Not Required To Establish A Fundamental Miscarriage Of Justice[27]

A. Neither This Court Nor Congress Has Required That New Evidence Of Innocence Is Necessary To Establish Actual Innocence Of A Sentence In This Context

State's Exhibit 6 conclusively establishes that Mr. Haley is actually innocent of the punishment he received. J.A. 40-51. Dretke, however, points to this virtue and argues that it is a vice. The fact that his claim of actual

333 F.3d 372 (CA2 2003) (denying petitioner's claim of actual innocence of the sentence); *Talj v. United States*, 1997 WL 705807 (S.D.N.Y.1997); *Walden v. United States*, 63 Fed. Appx. 568 (CA2 2003). In each of these cases, the petitioner did not obtain relief. Respondent has identified only one case prior to *Spence* applying the exception. *Borrego v. United States*, 975 F. Supp. 520 (S.D.N.Y. 1997).

[26] Courts in at least two other circuits applied the *Sawyer* standard for several years in noncapital cases, and also did not experience any massive influx in unmeritorious claims. *See, e.g., Mills v. Jordan*, 979 F.2d 1273, 1278-79 (CA7 1992) *superseded by statute as stated in Hope v. United States*, 108 F.3d 119 (CA7 1997); *Jones v. Arkansas*, 929 F.2d 375, 380-81 (CA8 1991); *Pilchak v. Camper*, 935 F.2d 145, 148 (CA8 1991).

[27] The propriety of the Fifth Circuit's decision on the merits is beyond the scope of the question presented. Thus, this Court need not reach the arguments related to the merits of Mr. Haley's defaulted claim. *See, e.g.*, Sup. Ct. R. 14.1; *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992).

innocence can be evaluated solely by reference to the trial court's record in fact reduces the impact on the interests served by this Court's procedural default rules. The consideration of record evidence only is less likely to detract from the original trial's status as the "main event." *Wainwright*, 433 U.S. at 90. Similarly, this narrower inquiry is less taxing on the resources of the state, and is consistent with the purposes of the fundamental miscarriage of justice exception. *See id.*

This Court has not held that new evidence of innocence of a sentence is required under *Sawyer* to permit a federal habeas court to reach the merits of a procedurally defaulted claim. *See Sawyer*, 505 U.S. at 336. *Cf. Schlup*, 513 U.S. at 324. The Court in *Schlup* suggested that new evidence is required in cases where the petitioner alleges "actual innocence" of the crime in a second or successive petition. *Schlup*, 513 U.S. at 324 (stating that to be credible, a claim of "actual innocence" of the crime "requires petitioner to support his allegations of constitutional error with new reliable evidence . . . that was not presented at trial"); *see id.* at 332 (O'Connor, J., concurring) ("The Court holds that, in order to have an abusive or successive habeas claim heard on the merits, a petitioner who cannot demonstrate cause and prejudice 'must show that it is more likely than not that no reasonable juror would have convicted him' in light of newly discovered evidence of innocence").

However, the reasons for requiring new evidence where the petitioner alleges "actual innocence" of the crime in a subsequent writ are not present where the petitioner alleges "actual innocence" of the sentence as a gateway to reach the merits of a procedurally defaulted

claim raised in an initial petition. Moreover, the heightened standard of proof required to establish "actual innocence" of a noncapital sentence is sufficient to ensure that the exception remains rare. *See id.* More specifically, the fundamental difference between a procedurally defaulted claim (raised in an initial petition) and a subsequent petition justifies requiring new evidence in the latter context, but not in the former.

The procedural default doctrine operates to bar federal review of a claim for failure to comply with a state procedural rule. *See* R. Hertz & J. Liebman, *Federal Habeas Corpus Practice and Procedure* (4th ed. 2001) § 26.1. By contrast, the law dealing with successive federal petitions may bar review of claims raised in a second or successive petition, where the petitioner has already benefited from at least one round of federal habeas review. *Id.* at § 28.1. Although historically the Court has treated these doctrines similarly, it has also recognized that the disruptions caused by second or successive petitions are "much more severe." *See McCleskey v. Zant*, 499 U.S. 467, 492 (1991) ("if reexamination of convictions in the first round of habeas offends federalism and comity, the offense increases when a State must defend its conviction in a second or subsequent habeas proceeding on grounds not even raised in the first petition"). As noted above, Congress has recognized these differing costs in AEDPA by codifying strict requirements for filing second or successive petitions but leaving procedural default rules unchanged in noncapital cases, as well as capital cases in non-opt-in states. 28 U.S.C. § 2244. Thus, the fundamental miscarriage of justice exception, as applied in the context of procedural defaults, serves a qualitatively different function than in the context of subsequent writs. In the

former, it permits a federal habeas court at least one opportunity to release a person who is factually innocent of the basis for the specific sentence. By contrast, in the second or successive petition context, the doctrine has not prohibited the presentation of evidence of innocence to a federal court – it has merely placed a restriction on how many times a petitioner can attempt to demonstrate his or her innocence. To the extent that a petitioner fails to establish his or her innocence in the first proceeding (or does not deny his or her guilt in that petition), he or she has had a chance to do so and it is reasonable to demand that before the prisoner submit another petition he make a showing that the evidence of innocence now being presented was not available at the time of the earlier petition.

AEDPA, as discussed above, did not alter this Court's procedural default doctrine in this context. The basic canon of statutory interpretation, *expressio unius exclusio alterius*, requires the Court to presume that an amendment to one section – but not to another – is intentional and entitled to respect. *See United States v. Vonn*, 535 U.S. 55, 65 (2002); *see also Custis v. United States*, 511 U.S. 485, 491 (1994). Congress' decision to adopt 28 U.S.C. § 2244(b), requiring new evidence (if the claim does not rely on new constitutional rule made retroactive by this Court) for the consideration of an "abusive petition" and its passage of 28 U.S.C. § 2264, similarly requiring new evidence in some circumstances to raise procedurally defaulted claims in capital cases arising from opt-in

states,[28] confirms that Congress did not intend to alter this Court's procedural default doctrine in noncapital cases.

B. Mr. Haley Is Entitled To Consideration Of His Underlying *Jackson v. Virginia* Claim Based On The Same Evidence That Was Used To Establish The Fundamental Miscarriage Of Justice

Dretke argues that Mr. Haley has alleged a "freestanding" claim of actual innocence. Pet. Br. 35-36. This is demonstrably untrue. Mr. Haley in his initial petition alleged that he was denied due process of law because the evidence submitted during the punishment phase of his trial was insufficient to prove the enhancement allegations and expressly relied on a Fifth Circuit decision which held that such a claim is properly analyzed under *Jackson v. Virginia*. J.A. 124 (citing *McGee v. Estelle*, 732 F.2d 447, 451 (CA5 1984)). Furthermore, the Fifth Circuit addressed "actual innocence" only as a gateway to reach the defaulted *Jackson* claim.[29] Pet. App. 17a.

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[28] The likely reason for treating procedural default in capital cases arising from opt-in states differently than procedural defaults in noncapital cases is the added safeguard of competent state habeas counsel in the former. *See* 28 U.S.C. § 2261 (requiring the appointment of "competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have . . . become final").

[29] *See Schlup*, 513 U.S. at 313-15 (discussing a gateway claim of "actual innocence"). Mr. Haley does not suggest, in any way, that a petitioner's ability to pass through the "actual innocence" gateway should end the inquiry. A petitioner must be able to establish an underlying constitutional claim in order to obtain relief on the merits.

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The fact that evidence used to establish passage through the fundamental miscarriage of justice gateway may also be relevant to the substantive due process claim does not transmute the separate inquiries into a "free-standing claim of actual innocence." Pet. Br. 39. Similarly, the commonality of the evidence does not subvert the cause and prejudice standard. Pet. Br. 32-33. Often, the evidence relied upon to overcome a procedural default will be the same evidence that supports the substantive claim for relief, for the simple reason that the factual error that caused the confinement of an actually innocent person is closely related to the underlying constitutional claim. Dretke and *amici* point to no case by this Court holding that consideration of evidence for both purposes is in any way improper.

Instead, the Court has considered the same evidence both in analyzing the question of procedural default and in evaluating the merits of a claim. For example, in *Strickler v. Greene*, 527 U.S. 263, 266 (1999), this Court addressed a procedurally defaulted *Brady* claim.[30] The Court noted that "cause and prejudice parallel two of the three components of the alleged *Brady* violation itself." *Id.* at 282. This Court found that the suppression of the favorable evidence – one of the elements of the substantive *Brady* claim – constituted cause. *Id.* at 289. Although the Court held that the petitioner failed to establish prejudice, it relied on the same evidence to determine materiality of the suppressed

See Sawyer, 505 U.S. at 348 (requiring an underlying constitutional claim).

[30] *Brady v. Maryland*, 373 U.S. 83 (1963).

evidence – another element of the substantive claim – and prejudice. *Id.* at 296.

Dretke in effect argues that a *Jackson* claim should be categorically excluded from the otherwise unlimited class of claims which may be reviewed by a federal habeas court when a petitioner is able to establish "actual innocence." This is unjustified and would produce anomalous results. The function of the fundamental miscarriage of justice exception is to permit merits review of constitutional claims of persons who have received convictions or sentences for which they were not eligible. There is no reason why a claim arising under *Jackson v. Virginia* should be subject to any different treatment than other constitutional claims. Indeed, if anything, *Jackson* claims are more appropriately heard under this gateway because, unlike many other types of constitutional claims, the requirement that the state present sufficient evidence to support a conviction is directly linked to the fundamental question of whether the person is actually innocent of the offense or sentence he or she received.[31] Ironically, under Dretke's suggestion a petitioner who is able to satisfy the stringent requirements of the fundamental miscarriage of justice exception by showing clear and convincing evidence of his or her actual innocence would be prevented from obtaining relief on a meritorious constitutional claim because of the close link between the constitutional claim and the fact of actual innocence.

[31] *Cf. Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989) ("Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is 'actually innocent' of the sentence he or she received").

The District Court properly reached Mr. Haley's procedurally defaulted *Jackson v. Virginia* claim because, as discussed above, he showed, by clear and convincing evidence, that but for the constitutional violation, no reasonable juror would have found him eligible for the sixteen year and six month sentence he received. *See Sawyer*, 505 U.S. at 348. Moreover, relief was appropriate because, viewing the record evidence in the light most favorable to the prosecution, no reasonable juror *could* have found that the prior convictions were sequential beyond a reasonable doubt.[32] *See, e.g., Moore v. Parke*, 148 F.3d 705, 708 (CA7 1998) ("Because the Indiana courts require that the state prove habitual offender status beyond a reasonable doubt, we apply the standard of review articulated in *Jackson v. Virginia*"); *Shaw v. Johnson*, 786 F.2d 993, 1000 (CA10 1986), *cert. denied*, 479 U.S. 843 (1986); *Williams v. Duckworth*, 738 F.2d 828, 831-32 (CA7 1984), *cert. denied*, 469 U.S. 1229 (1985); *McGee v. Estelle*, 732 F.2d 447, 451 (CA5 1984); *see also Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (holding that if state law affords defendants the right to jury sentencing it violates due process for the state to withhold that right).[33]

[32] Under Texas law, these enhancement allegations must be proven beyond a reasonable doubt. *Tomlin*, 722 S.W.2d at 705; *Ex parte Augusta*, 639 S.W.2d 481, 484 (Tex. Crim. App. 1982), *overruled on other grounds by, Bell v. State*, 994 S.W.2d 173 (Tex. Crim. App. 1999); *Williams v. State*, 899 S.W.2d 13, 14 (Tex. App.-San Antonio 1995, no pet.); *see also* Tex. Crim. Proc. Code Ann. art. 37.07 (Vernon 2003).

[33] In fact, Mr. Haley could have satisfied the pre-*Jackson* "no evidence" standard or, for that matter, any standard. *See Thompson v. Louisville*, 326 U.S. 199, 206 (1960).

CONCLUSION

The Court should affirm the judgment of the Court of Appeals, or, alternatively vacate and remand to the Court of Appeals with instructions to remand to the District Court to consider Mr. Haley's ineffective assistance of counsel claim.[34]

Respectfully submitted,

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JANUARY 2004

[34] In his federal petition, Mr. Haley raised an ineffective assistance of counsel claim related to the improper enhancement of his sentence. J.A. 119, 126. This claim is not procedurally defaulted and is fully exhausted. J.A. 146, 136. However, the District Court did not rule on it. Pet. App. 51a, 37a, 8a, n.9; S.G. Br. 25-26 & n.8.

(12)

No. 02-1824

In The
Supreme Court of the United States

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Petitioner,

v.

MICHAEL WAYNE HALEY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

Haley does not attempt to defend the rule adopted by the Fourth and Fifth Circuits that the "actual innocence" exception applies only to habitual offender findings in noncapital sentencing. Nor does Haley argue for the rule adopted by the Second Circuit that the "actual innocence" exception applies to any fact resulting in a higher sentence. Instead, Haley suggests a new rule—not adopted by any court of appeals—that the "actual innocence" exception apply to any noncapital sentencing enhancement that increases the statutory maximum penalty.

Haley and his *amici*'s urged erosion of the procedural default rule is unpersuasive. Their arguments fail to give the proper consideration to the Court's "actual innocence" jurisprudence, which has consistently limited the exception to the extraordinary circumstances where a petitioner can demonstrate factual, not legal, innocence, and they ignore the State's strong interest in protecting its procedural rules. Haley would have this Court extend the "miscarriage of justice" exception to a broad class of noncapital sentencing claims in a way that would undermine the procedural default rule and the principles of federalism and comity on which it is based.

The cause and prejudice standard is broad enough to prevent unjust imprisonment in virtually every circumstance—indeed, it could well have provided Haley relief had he preserved his ineffective assistance claims—and the "ends of justice" do not compel extending the exception to the noncapital sentencing context where it could well become subject to widespread abuse. Accordingly, the Court should reverse the judgment of the court of appeals and hold that the "actual innocence" exception does not

allow review of procedurally defaulted claims of noncapital sentencing error.

I. PRINCIPLES OF FEDERALISM, COMITY, FINALITY, AND CONSERVATION OF RESOURCES WEIGH AGAINST EXPANDING THE "ACTUAL INNOCENCE" EXCEPTION TO REACH PROCEDURALLY DEFAULTED CLAIMS OF NONCAPITAL SENTENCING ERROR.

A. The State Has Significant Interests in Ensuring the Integrity of Its Procedural Rules.

Haley and his *amici* erroneously contend that Texas has no legitimate federalism or comity interest in enforcing Haley's sentence because it is contrary to Texas substantive criminal law. Resp. Br., at 18; Brief of Zachary W. Carter, *et al.* ("Former Pros. Br."), at 21-22; Brief for Professors of Law James S. Liebman, *et al.* ("Law Prof. Br."), at 21-23. They argue further that the federal court actually vindicated Texas substantive law by granting Haley's request for habeas relief. Haley and his *amici* are, however, ignoring the State's strong interest in enforcing its *procedural* law.

Comity is implicated whenever a federal court upsets a state-court judgment. The affront to the State is particularly great when a federal court upsets a state-court judgment on a claim never presented to the state court; it matters little whether the law alleged to have been violated is substantive or procedural. Indeed, the Court has expressly recognized the importance of procedural rules to the State and the particularly high costs to the values of finality, comity, and federalism that result from issuance of the writ under these circumstances. *See Engle v. Isaac*, 456 U.S. 107, 128 (1982) (recognizing that the costs of habeas relief are "particularly high when a trial default

has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts").

In making the argument that federalism and comity are served, rather than undermined, by the federal court's issuance of the writ, Haley and his *amici* ignore Texas's procedural rules, which bar relief if a claim is not raised in a timely manner on direct review. Texas has already weighed the relative importance of its substantive and procedural rules and has determined that the procedural bar rules should take precedence. Haley would have the federal courts reverse the State's reasoned policy choice and dictate that Texas's substantive law necessarily trumps its procedural rules.

Indeed, Haley's argument proves too much. The essential premise of the procedural default rule is that, *even with a meritorious claim*, a habeas petitioner should be denied relief if he failed properly to preserve the error. Haley's argument would mean that every time there was in fact a state substantive law error in a sentence (by hypothesis, in every such habeas petition) a federal court would be justified in disregarding the state procedural bar in the name of vindicating "federalism" and the state substantive law. But state law already resolves the matter by determining that procedural default bars consideration of any substantive error, and so federalism is subverted, not respected, when a federal court sets aside that determination.

More fundamentally, the purpose of federal habeas review is not to vindicate state law but to ensure respect for federal law and the federal Constitution. As the Court held in *Pulley v. Harris*:

> "[u]nder 28 U.S.C. §2241, a writ of habeas corpus disturbing a state-court judgment may issue *only* if it is found that a prisoner is in custody 'in violation of the Constitution or laws or treaties of the United States.' *A federal court may not issue the writ on the basis of a perceived error of state law.*" 465 U.S. 37, 41 (1984) (citing 28 U.S.C. §2241(c)(3)) (emphases added).

Federal courts cannot justify rewriting established Texas procedural law based on state, rather than federal, legal considerations. *Cf. Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."). Therefore, even if Haley were correct that under Texas law the substantive limitations on sentence enhancement should supersede the procedural bar rules, state, rather than federal, courts are the proper arbiters of that determination.

B. The State Has a Significant Interest in Preventing Abusive Trial Conduct and Avoiding Costs Associated with Resentencing.

Haley and his former prosecutor *amici* erroneously claim that there is no need to preclude review of claims like Haley's because there is no danger of sandbagging when a defendant is asserting that he is "actually innocent" of the facts necessary to support a sentencing enhancement. Resp. Br., at 22; Former Pros. Br., at 23. This argument, however, fails to give due consideration to the State's interests in finality and conservation of resources.

First, although the danger of sandbagging may not be quite as great in the sentencing context as during the adjudication of guilt or innocence, it certainly exists. If the

State believes that it is obtaining the appropriate level of punishment by relying on one particular recidivist sentencing enhancement, the State may forgo other charges or other possible grounds for sentencing enhancements. If a defendant waits until collateral review to challenge the enhancement on which the State has relied, the State may be deprived of the opportunity to pursue other sentencing options because of lost evidence, missing witnesses, or the running of a statute of limitations. Because such belated challenges may prevent the State from availing itself of other charges or grounds for enhancement, there is a danger that defendants will avoid the full punishment that is appropriate.

For this reason, Haley and his *amici*'s contention that the costs of resentencing will always be low and relatively easy to administer is inaccurate. *See* Resp. Br., at 22-23, 34-35; Former Pros. Br., at 27-28; Law Prof. Br., at 20, 21, 23, 26. The State's ability to advance alternate grounds for enhancement or bring additional criminal charges may be entirely frustrated by the passage of time, and will certainly require significant additional time and resources.

Second, as Haley acknowledges, concern about sandbagging is only one reason for the procedural default rules. *See* Resp. Br., at 22. Even discounting intentional sandbagging, if procedural default rules can be easily evaded, defendants and defense counsel will have less reason to be diligent about asserting all claims at trial and on direct appeal. Apart from creating perverse incentives, weakened finality interferes with the retributive, deterrent, and rehabilitative purposes of criminal law, and may prevent the imposition of the appropriate punishment because the passage of time thwarts efforts for retrial and resentencing.

C. The Length of Haley's Sentence Should Not Overcome the State's Concerns.

Haley's argument that his "actual innocence" claim must prevail over the State's interest in enforcing its procedural default rules is premised on the assumption that it is simply too great an injustice for someone to be in jail for over sixteen years for committing this particular crime. However, this sentence was imposed by a jury of twelve of Mr. Haley's peers, who examined all the evidence and decided that this sentence was appropriate and just. Furthermore, a defendant who engaged in the exact same conduct as Mr. Haley, but committed his second felony three days later, would not be able to challenge his sentence at all—notwithstanding any assertion that the jury's reasoned conclusion was "unjust." And that is because the Texas Legislature has reasonably determined that a career criminal—which, for all intents and purposes (except for the three-day date discrepancy) Haley unquestionably is—is deserving of a substantially longer sentence than a one-time offender.

Haley's appeal to equity is also significantly undercut by the limited rule he offers. His rule focuses not on the absolute length of the sentence, but rather on whether the enhancement mechanism was effectuated by increasing the maximum sentence allowed. Thus, under Haley's theory, a prisoner who was statutorily subject to a broad sentencing range of two-to-twenty years, and sentenced to twenty—even with the judge expressly predicating that sentence on the same mistake of fact concerning the sequential nature of the multiple convictions—would be

allowed no relief.[1] And, in neither Haley's case nor that hypothetical unserved by Haley's proposed rule would there be any manifest inequity. There would be legal error, but error that could have and should have been addressed through objection at trial or on direct appeal, not collateral federal review following procedural default.

II. The Fact That Haley's Sentence Was in Error Under State Law Does Not Dictate That He Should Be Allowed to Overcome His Procedural Default Under the "Actual Innocence" Exception.

A. The Question Whether Haley Could Have Obtained Habeas Relief Had He Not Procedurally Defaulted Is Irrelevant.

Haley and his law professor *amici* argue that habeas corpus has traditionally been available where the sentencing court lacked legal authority to impose the sentence that it imposed. Resp. Br., at 9, 11-12; Law Prof. Br., at 11-17. Accordingly, they contend, it would be a fundamental miscarriage of justice to deny Haley habeas relief.[2] But

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[1] In effect, Haley accepts that finality, comity, and resource concerns can trump erroneous sentences arithmetically greater than the sentence involved here.

[2] Haley offers the Court's decision in *Townsend v. Burke*, 334 U.S. 736 (1948), in support of this argument. In *Townsend*, the Court granted relief based on a due process violation—in particular, the absence of counsel at the defendant's sentencing hearing during which erroneous information was received. *Id.*, at 741. The Court suggested that it was the absence of counsel—not the sentencing error—that was the critical feature: "Fair prosecutors and conscientious judges sometimes are misinformed or draw inferences from conflicting evidence with which we would not agree. *But even an erroneous judgment*, based on a scrupulous and diligent search for truth, *may be due process of law. Id.* (emphasis added).

these arguments entirely ignore the additional significance of Haley's procedural default.

The question presented in this case is not whether a defendant's claim that his sentence is unlawful is *generally* cognizable on habeas. It may well be, but the question presented in this case is whether habeas relief from a noncapital sentence is available *when the defendant has procedurally defaulted that claim* by failing to raise it on direct review, and where the defendant has not asserted cause and prejudice to excuse the default.[3] Even if a claim of an unlawful sentence is generally cognizable, review is properly foreclosed when the claim has been procedurally defaulted unless the claim falls under the narrow "miscarriage of justice" exception for "actual innocence."

B. Haley Could Have Established His Right to Relief by Demonstrating Cause and Prejudice for His Default.

Even if Haley and his *amici* are correct that, historically, habeas would issue to correct an erroneous noncapital sentence, review of such a claim—once procedurally defaulted—is properly pursued under the

[3] Haley and the law professor *amici*'s reliance on Paul Bator's article, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 HARV. L. REV. 441 (1963), for the proposition that habeas relief was historically available to correct an unlawful sentence is therefore misplaced. Although Professor Bator discusses the circumstances under which courts traditionally granted relief, his article expressly does not "propose to deal with the vexing question whether a state prisoner who fails to raise his federal contentions in accordance with state procedural law loses his right to raise them on federal habeas corpus." *Id.*, at 444. Accordingly, his academic discussion offers no guidance to the Court on the proper resolution of this case.

Court's well-established cause and prejudice test. *Wainwright v. Sykes*, 433 U.S. 72 (1977).

Satisfying the cause and prejudice test is the proper avenue to correct erroneous noncapital sentences. In the vast majority of cases—such as those adverted to by Haley's *amici*—cause and prejudice will provide ample outlet to correct improper sentences. If a petitioner cannot demonstrate cause, then there is good reason to deny federal habeas relief to avoid making an end run around the state trial proceedings.

Indeed, in this case, a substantial argument can be made that Haley could have demonstrated cause. *See Murray v. Carrier*, 477 U.S. 478, 488-89 (1986) (holding that ineffective assistance of counsel constitutes cause for a procedural default); *see also Strickland v. Washington*, 466 U.S. 668, 690 (1984). Despite the high burden that the *Strickland* test presents, *Carrier*, 477 U.S., at 488-89; *Strickland*, 466 U.S., at 690, under these facts Haley may well have been able to cross that bar. The error at issue was plain on the face of the evidence admitted at sentencing and could have been noticed by his attorney's even skimming the documents at issue.

But the magistrate judge declined to grant relief on that ground, and Haley did not cross-appeal that determination. Nevertheless, the fact that in this one isolated instance a petitioner who may have been able to demonstrate cause failed to press his ineffective assistance claim should not become a mandate to expand the "actual innocence" exception to all noncapital sentencing issues.

There are likely to be very few cases where a petitioner cannot demonstrate cause and prejudice with

respect to procedurally defaulted noncapital sentencing errors but nonetheless can raise a compelling equitable argument for his relief. But, if this Court extends the "actual innocence" exception to all noncapital sentencing errors, there are likely to be a great number of petitioners who raise such arguments, consuming time and resources from the States and the courts for innumerable federal court challenges of state convictions. And, the door would be opened for some lower courts, applying this Court's precedents more broadly than they are written, to grant the writ and set aside state sentences with increasing regularity.

In any event, even if Haley were to lose in this Court, it is still possible that he would ultimately receive relief. Although the magistrate judge denied all of Haley's "remaining claims," Pet. App. 55a, 37a, she did "not address" the ineffective assistance claims concerning sentencing, Pet. App. 51a, and on remand the court of appeals could deem Haley's *pro se* pleadings sufficient to preserve that claim. Thus, his particular factual circumstances should not justify expanding the exception to the procedural default rule across the board.

C. Haley's Claim That His Sentence Is Invalid Under State Law Is Not Cognizable On Habeas Review.

Moreover, although there is some uncertainty about the circumstances under which habeas corpus was

traditionally available, *see* Law Prof. Br., at 12-13,[4] there can be no question that, under the current federal statute authorizing habeas relief, habeas is available only to correct a violation of "the Constitution or laws or treaties of the United States." 28 U.S.C. §2241(c)(3). This Court has squarely held that the mere fact that a sentence is unlawful under state law is not a grounds for federal habeas relief because federal habeas corpus is not designed to vindicate state law. *See Pulley*, 465 U.S., at 41. Therefore, Haley's claim that his sentence is erroneous under state law does not support his claim for habeas relief.

Haley argues that the lack of evidence supporting his sentencing enhancement amounts to a due process violation similar to a *Jackson v. Virginia* claim that there was insufficient evidence to support one of the elements of the underlying offense. 443 U.S. 307 (1979); Resp. Br., at 43-46. But this Court has never recognized such a due process claim.

Indeed, Haley's reliance on *Jackson* only serves to highlight the inherent flaw in his basic contention that he

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[4] Indeed, the cases cited by the Law Professors for their argument that habeas relief was traditionally available to correct an unlawful state sentence did not even involve state sentences. Rather, they involved claims by federal prisoners challenging their sentences as unconstitutional or in violation of the laws of the United States. *See, e.g., Ex Parte Lange*, 85 U.S. 163, 176 (1873) (granting habeas relief on double jeopardy claim); *Ex Parte Snow*, 120 U.S. 274, 285-86 (1887) (same); *Ex Parte Nielsen*, 131 U.S. 176, 190-91 (1889) (same); *Ex Parte Wilson*, 114 U.S. 417, 429 (1885) (federal prisoner convicted without proper indictment); *In re Mills*, 135 U.S. 263, 268 (1890) (federal sentence not authorized by law).

is "actually innocent." Haley's theory is as follows: because the evidence was legally insufficient to sentence him as a habitual offender, he is "actually innocent" of the sentence. Therefore, it would be a miscarriage of justice to deny him habeas relief under the procedural default rule.

Under Haley's logic, any conviction or sentence that was based on allegedly insufficient evidence would result in an "actually innocent" defendant being convicted and sentenced. If Haley is correct in his conclusion that a fundamental miscarriage of justice necessarily results in this circumstance, then the procedural default rule would be inapplicable to claims of legal insufficiency. That proposition cannot be squared with the Court's clear understanding, expressed in *Jackson*, 443 U.S., at 321, that insufficiency-of-the-evidence claims can be procedurally defaulted, and with the Court's repeated insistence that the "actual innocence" exception remain "narrow" and applicable only to the most "extraordinary circumstances." *See, e.g., Schlup v. Delo*, 513 U.S. 298, 321 (1995); *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989).

III. THE "ACTUAL INNOCENCE" EXCEPTION SHOULD NOT BE EXPANDED TO ALLOW REVIEW OF PROCEDURALLY DEFAULTED CLAIMS OF NONCAPITAL SENTENCING ERROR.

A. The Court's Decision in *Sawyer v. Whitley* to Apply the Exception in Capital Cases Should Not Dictate the Result in Noncapital Cases.

Haley erroneously argues that the Court's decision in *Sawyer v. Whitley*, 505 U.S. 333 (1992), forecloses the Director's argument that the "actual innocence" exception should not apply to noncapital sentencing cases. Resp. Br.,

at 13. To reach this conclusion, he describes *Sawyer* as creating an "eligibility test" that grants relief based on the sole criterion that the alleged error "undermined the accuracy of the guilt or sentencing determination." *Id.* (quoting *Smith v. Murray*, 477 U.S. 527, 538-39 (1986)). But *Sawyer* did not create a general eligibility test for all alleged sentencing errors. The Court should decline to interpret *Sawyer* so broadly.

In *Sawyer*, the Court conspicuously did not hold that the "actual innocence" exception allows review of all procedurally defaulted claims of sentencing error. *Sawyer*, 505 U.S., at 339. Rather, the Court explicitly limited its decision by explaining that in allowing a claim of "innocence of death" it was "striv[ing] to construct an analog to the simpler situation represented by the case of a noncapital defendant"—*i.e.*, "the case where the State has convicted the wrong person of the crime." *Id.*

Haley disputes that the Court's statements in *Sawyer* limit the decision to capital sentences. Resp. Br., at 16-17. Haley insists that the Court was "merely contrasting the claim of actual innocence of a sentence in [*Sawyer*] with the more typical claim in a noncapital case that the petitioner is innocent of all criminal conduct." Resp. Br., at 17. The Court did draw the contrast identified by Haley, but the natural implication of the Court's statements is that "innocence of the crime" is the only kind of "actual innocence" in a noncapital case. Indeed, the Court carefully described the claim recognized in *Sawyer* as a claim of "innocence of death" not "innocence of sentence" as Haley would have the Court hold.

At the very least, the Court's statements in *Sawyer* support the Director's arguments that the ordinary and

typical understanding of "actual innocence" is innocence of the crime, that the term does not naturally apply to sentencing, and that the Court has not yet extended the "actual innocence" exception to noncapital sentencing—points that Haley cannot and does not dispute. *See* Pet'r Br., at 22, 23; *see also* U.S. Br., at 14-15.

B. The Compelling and Unique Situation Presented by a Habeas Petitioner Who Claims To Be "Innocent of Death" Justifies a Different Application of the "Actual Innocence" Exception in That Context.

Haley and his *amici* assert that the rules of habeas corpus apply uniformly to capital and noncapital cases in an attempt to buttress their argument that *Sawyer* mandates the result in this case. Resp. Br., at 12-17; Former Pros. Br., at 6-10; Law Prof. Br., at 19-24. That argument, however, ignores the special scrutiny this Court has accorded capital sentences.

The cornerstone of Haley and his *amici*'s argument in this respect is the Court's statement in *Murray v. Giarratano* that it had "refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus." 492 U.S. 1, 9 (1989). Their reliance on that statement is, however, misplaced.

The Court was referring in *Murray* to its prior conclusion that the additional safeguards imposed by the Eighth Amendment at trial ensure that capital sentences are sufficiently reliable, so that capital defendants may be held to the same "cause and prejudice" standard for excusing procedural defaults as other defendants. *Id.*, at 8-10.

The Court was undoubtedly correct that the procedural default rule should apply uniformly in capital and noncapital cases. But, by its very terms, this Court's "miscarriage of justice" exception looks to matters beyond the strict rules. The Court imported that exception from now-repealed language in 28 U.S.C. §2244 looking to the "ends of justice"; in so doing, the Court sought explicitly to balance equitable factors not encompassed in the text of the federal habeas statute. And, in that equitable balancing, the Court has chosen to recognize the unique nature of the death penalty.

For that reason, in *Sawyer* the Court created the strained construct of "innocence of the death penalty," in order to "construct an analog to the simpler situation represented by the case of a noncapital defendant." 505 U.S., at 339.

The unquestioned severity and finality of the death penalty led to that result in the balancing of interests between the State's interest in obtaining closure to the criminal process and the petitioner's interest in obtaining review. The erroneous imposition of a death sentence is at least as great an injustice as convicting the wrong person of the crime. That fact, combined with the relative infrequency of the death penalty, tipped the balance in favor of applying the "actual innocence" exception in the capital context. By contrast, noncapital sentencing error is alleged far more frequently and has results of far less severity.

Haley is also incorrect in asserting that the finality of the death penalty as compared to a noncapital sentence has no bearing on the degree of injustice entailed by an erroneous sentence. It is true that "just as a person's life cannot be returned, the liberty taken from one who is

unjustly confined can never be restored." Resp. Br., at 15. But a person who has been unjustly confined remains alive—he can seek executive clemency or other redress while incarcerated, and he can look forward to life after release. A person who has been unjustly executed can, of course, do neither. The two situations hardly present "the same result," which is why this Court in *Sawyer* limited its consideration to the narrow circumstances of "innocence of the death penalty."

C. Alternatively, *Sawyer* May Be Understood As Allowing the "Actual Innocence" Exception in Cases Involving Innocence of the Aggravated Offense of Capital-Eligible Murder.

Haley's reliance on *Sawyer* is misplaced for the alternative reason discussed by the *amicus* briefs of the United States and the State of Illinois, *et al.* As *amici* explained, *Sawyer* may be viewed, in light of the Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), as addressing innocence of an aggravated offense, rather than innocence of a sentence. Under that interpretation, the Court did not intend *Sawyer* to allow consideration of procedurally defaulted claims of noncapital sentencing error. Haley and his *amici*'s attempts to defeat this argument are unpersuasive.

First, Haley's argument that *Apprendi* is inapplicable to this case because it did not concern the scope of the "actual innocence" exception misses the point. Resp. Br., at 26-27. Haley fails to acknowledge that *Apprendi* and *Ring* may well directly impact the Court's "actual innocence" cases. *Apprendi* and *Ring* make clear that the facts the Court in *Sawyer* referred to as "elements of the capital

sentence" are actually elements of the greater offense of capital murder. Thus, a petitioner's claim that he is innocent of the facts that make him eligible for capital punishment is, under *Apprendi* and *Ring*, a claim that he is innocent of the aggravated offense of capital murder. Properly understood, then, *Sawyer* and the Court's other cases applying the "actual innocence" exception in the capital context do not actually involve innocence of a sentence but innocence of a substantive offense.

Second, Haley's observation that in *Schlup*, 513 U.S., at 326, and *Calderon v. Thompson*, 523 U.S. 538, 560 (1998), the Court continued to characterize the exception as involving innocence of a capital sentence rather than innocence of the aggravated offense of capital murder is of no consequence. Resp. Br., at 28-29. *Schlup* and *Calderon* predate *Apprendi* and *Ring*. When it issued those decisions, the Court had not yet had the opportunity to consider the effect of *Apprendi* on the "actual innocence" exception.

Finally, Haley and his former prosecutor *amici* erroneously argue that, even if *Sawyer* is understood as involving "actual innocence" of an aggravated offense, that understanding supports the court of appeals's holding that Haley is "actually innocent" because he is "actually innocent" of the aggravated offense of theft by a habitual offender. Resp. Br., at 29-31; Former Pros. Br., at 12-13. This argument cannot be squared with the Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

In *Almendarez-Torres*, the Court held that the Constitution does not require that recidivism facts—although raising the statutory maximum penalty—be treated as

elements of the crime. 523 U.S., at 230. And *Apprendi* specifically left that decision untouched. 530 U.S., at 490. Accordingly, recidivism facts like prior offenses under a habitual offender statute are not considered elements of the crime under *Apprendi*, but remain sentencing factors.

Haley disputes this interpretation of *Apprendi* and *Almendarez-Torres*, erroneously arguing that the Court in *Apprendi* merely declined to reconsider *Almendarez-Torres* and did not hold that prior convictions that raise the statutory maximum are not elements of the crime. There was no need for the Court in *Apprendi* to restate its *Almendarez-Torres* holding, and it specifically carved recidivism facts out of its holding in *Apprendi*. *See* 530 U.S., at 490 ("Other than the fact of a prior conviction . . . "). *Apprendi* does not *sub silentio* overrule *Almendarez-Torres*, but rather explicitly accommodates it.[5]

Moreover, even if this Court ultimately chooses to overrule *Almendarez-Torres* in some later case presenting that issue, that decision would not provide the relief Haley seeks. That a given fact must constitutionally be submitted to the jury—as Haley's prior convictions unquestionably were—does not mean that the "ends of justice" require extending the "narrow" "actual innocence" exception to the

[5] *Amici* former prosecutors argue without adequate basis that the rule of *Almendarez-Torres* "has effectively been abandoned." Former Pros. Br., at 14-16. That argument cannot be squared with the Court's deliberate recognition of a recidivism exception to the *Apprendi* rule in *Apprendi* itself and with the Court's repeated denial of certiorari petitions presenting the question whether *Almendarez-Torres* should be overruled.

procedural default rule to encompass all noncapital sentencing errors not properly preserved in state court.

IV. THE AEDPA DOES NOT DEMONSTRATE CONGRESSIONAL INTENT TO ALLOW REVIEW OF PROCEDURALLY DEFAULTED CLAIMS OF NONCAPITAL SENTENCING ERROR UNDER THE "ACTUAL INNOCENCE" EXCEPTION.

Haley incorrectly argues that Congress has expressed its intent that the "actual innocence" exception applies to noncapital sentencing by not addressing the general procedural default rules in the AEDPA. Resp. Br., at 23-25. Congress's decision not to legislatively alter the Court's procedural default practice sheds no light, however, on the question presented, and the Court should not attribute this unstated intent to Congress.

The Court has frequently counseled that it is extremely dangerous to draw inferences from congressional inaction. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (stating that, "as a general matter the argument [that congressional intent can be gleaned from congressional inaction] deserves little weight in the interpretive process"); *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction . . ."); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 649-50 (1990). Such an inference is particularly inappropriate in this case given that Haley has not pointed to any proposed language that was rejected by Congress, or otherwise demonstrated that Congress even considered the question presented here.

Moreover, even if the Court could conclude that Congress's inaction somehow indicated an implicit endorsement of existing law, this Court had never (and has never) applied the "actual innocence" exception in a noncapital sentencing case, and the courts of appeals were (and are) divided on the question, with no court adopting the rule that Haley is advancing here. Attributing to Congress the unstated intent to adopt the rule urged by Haley—despite Congress's silence and the uncertainty in the courts—would stretch the legislative acceptance doctrine too far.

Congress did not intend, and this Court has never held, that the procedural default rule should be set aside for federal collateral attacks of state court noncapital sentences on claims of "actual innocence."

CONCLUSION

The Court should reverse the Fifth Circuit's judgment.

Respectfully submitted,

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No. 02-1824

In the Supreme Court of the United States

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION, PETITIONER

v.

MICHAEL WAYNE HALEY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

A defendant generally may not raise a procedurally defaulted claim on habeas corpus unless he shows cause for the default and prejudice from the asserted underlying error. There is a narrow exception to that rule when the defendant shows that he is actually innocent. The question presented is whether the exception applies where the defendant asserts "actual innocence" of a noncapital sentence.

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In the Supreme Court of the United States

No. 02-1824

DOUG DRETKE, DIRECTOR,
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CORRECTIONAL INSTITUTIONS DIVISION, PETITIONER

v.

MICHAEL WAYNE HALEY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether the actual innocence exception allowing habeas corpus review of a procedurally defaulted claim applies to noncapital sentencing. Although this case involves a state prisoner seeking relief under 28 U.S.C. 2254, the actual innocence exception applies in the same manner to collateral attacks by both federal and state prisoners. The United States has a substantial interest in the outcome of this case because extending the actual innocence exception to noncapital sentencing would permit belated collateral attacks on prison sentences where those attacks are not justified by the need to prevent a fundamental miscarriage of justice.

STATEMENT

1. On April 9, 1997, respondent entered a Wal-Mart store in Smith County, Texas, picked up a calculator, and placed it in the front of his pants. Respondent then left the store,

reentered through another entrance, and exchanged the calculator for other merchandise. J.A. 8, 73-74.

Respondent was charged with theft of property valued at less than $1500, an offense that would ordinarily have been punishable as a Class A misdemeanor under Texas law. J.A. 8; see Tex. Penal Code Ann. § 31.03(e)(3) (West 2003). In this case, however, the indictment alleged that respondent had two prior convictions for theft, which resulted in the enhancement of his offense to a "state jail felony" punishable by up to two years of imprisonment. J.A. 8-9; see Tex. Penal Code Ann. §§ 12.35(a), 31.03(e)(4)(D) (West 2003). The indictment further alleged that respondent had been convicted in 1991 of delivery of amphetamine and in 1992 of robbery, and that the amphetamine conviction "became final prior to the commission" of the robbery. J.A. 9.[1] Under the Texas habitual felony offender statute, a defendant convicted of a state jail felony who "has previously been finally convicted of two felonies, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, * * * shall be punished for a second-degree felony." Tex. Penal Code Ann. § 12.42(a)(2) (West 2003). A second-degree felony conviction is punishable by imprisonment for "any term of not more than 20 years or less than 2 years." *Id.* § 12.33(a).

A jury found respondent guilty of the theft charge. Pet. App. 2a; J.A. 63-64. During the punishment phase of the trial, the State introduced records of respondent's prior convictions, which showed that, on October 18, 1991, respondent had been convicted of delivery of a controlled substance, and that, on September 9, 1992, respondent had been convicted of an attempted robbery, which he had committed on

[1] The indictment originally alleged that respondent had been convicted of "aggravated robbery," but the word "aggravated" was crossed out before respondent's trial. J.A. 9.

October 15, 1991. J.A. 42, 47. The State also presented one witness, who testified that respondent was the person identified in the records. Pet. App. 2a; J.A. 15-17. Respondent did not cross-examine the State's witness or put on any evidence.

After the parties rested, the trial court realized that the allegations in the indictment concerning respondent's prior convictions had not been read to the jury. Outside the presence of the jury, the court asked respondent whether he wanted to enter a plea to the prior-conviction allegations, but respondent declined to do so. The court reopened the proceedings to allow the State to read the allegations to the jury. Pet. App. 2a-3a; J.A. 16-17.[2]

The jury found the allegations concerning respondent's prior convictions to be true and "assess[ed] his punishment" at imprisonment "for a term of 16 years 6 months." Pet. App. 3a; J.A. 33-34. The court imposed the sentence determined by the jury. Pet. App. 3a; J.A. 63-66.

Respondent appealed his conviction. Although he raised several arguments, respondent did not argue that there was insufficient evidence to support the habitual felony offender enhancement. The state appeals court affirmed respondent's conviction. J.A. 72-83.

2. In February 2000, respondent filed an application for state post-conviction relief, in which he argued for the first time that his sentence was erroneously enhanced because his conviction for delivery of a controlled substance did not become final until after he committed the attempted robbery. J.A. 87-88; Pet. App. 4a. The state trial court characterized that claim as a challenge to the "sufficiency of the evidence to support the enhancements" and concluded that

[2] When the allegations were read to the jury, the word "aggravated" was not included since it had been deleted from the indictment. J.A. 18, 22.

"[t]he sufficiency of the evidence was [not] raised on direct appeal and can not be attacked by a Writ of Habeas Corpus." J.A. 108. Respondent also argued that his trial counsel rendered constitutionally ineffective assistance regarding the enhancements, J.A. 93, and the state trial court rejected that claim as well, J.A. 108. The Texas Court of Criminal Appeals denied respondent's habeas application based upon the findings of the trial court. Pet. App. 4a; J.A. 109.

3. Respondent then filed a federal petition for a writ of habeas corpus pursuant to 28 U.S.C. 2254 in the United States District Court for the Eastern District of Texas. He renewed the claim raised in his state post-conviction filing that his sentence was erroneously enhanced. Respondent argued that, because his conviction for delivery of amphetamine had not become final before he committed the robbery offense, his robbery conviction was not "for an offense that occurred subsequent to the first previous conviction having become final," as required by the habitual felony offender statute. Pet. App. 4a-5a; J.A. 118, 124; see Tex. Penal Code Ann. § 12.42(a)(2) (West 2003). In its response, the State conceded that respondent committed the attempted robbery offense before his conviction for delivery of a controlled substance became final and that respondent was therefore "correct in his assertion that the enhancement paragraphs as alleged in the indictment do not satisfy section 12.42(a)(2) of the Texas Penal Code." J.A. 140. The State argued, however, that respondent had procedurally defaulted the claim by failing to raise it in the trial court or on direct appeal. Pet. App. 7a; J.A. 142-144.

Respondent's habeas petition was referred to a magistrate judge, who recommended that it be granted. Pet. App. 38a-56a. The magistrate judge concluded that respondent's procedural default was excused because he was "'actually innocent' of a sentence for a second-degree felony." *Id.* at 49a. The district court adopted the magistrate judge's

report, granted the petition, and ordered that respondent be resentenced without the enhancement. *Id.* at 32a-37a.

4. The United States Court of Appeals for the Fifth Circuit affirmed the district court's judgment. Pet. App. 1a-20a. The court of appeals held that respondent had defaulted his claim that the evidence was insufficient to support his sentence enhancement by failing to raise that claim on direct review. Therefore, the court noted, federal review of the claim was barred unless respondent could show "cause and actual prejudice from the procedural default, or that failure to review the claim would result in a complete miscarriage of justice due to his 'actual innocence.'" *Id.* at 12a. The court concluded that respondent's default should be excused because, "based on the unquestionable improper enhancement of [respondent]'s sentence, he has shown that, but for the constitutional error, he would not have been legally eligible for the sentence he received." *Id.* at 13a.

The court rejected the State's claim that the actual innocence exception to the requirement that a habeas petitioner show cause and prejudice to excuse his procedural default does not apply to noncapital sentencing. Instead, the court held that the exception also "applies to noncapital sentencing procedures involving a career or habitual felony offender." Pet. App. 13a. The court noted that other courts of appeals have divided on the application of the actual innocence exception to noncapital sentences. *Id.* at 14a. The Seventh, Eighth, and Tenth Circuits, the court explained, have held that the exception applies to sentencing only in capital cases. *Id.* at 14a-15a (citing *Embrey* v. *Hershberger*, 131 F.3d 739, 740 (8th Cir. 1997) (en banc), cert. denied, 525 U.S. 828 (1998); *Hope* v. *United States*, 108 F.3d 119, 120 (7th Cir. 1997); *Reid* v. *Oklahoma*, 101 F.3d 628, 630 (10th Cir. 1996), cert. denied, 520 U.S. 1217 (1997)). The Second Circuit, in contrast, has applied the exception broadly to noncapital sentences. See Pet. App. 15a-16a (citing *Spence* v. *Super-*

intendent, Great Meadow Corr. Facility, 219 F.3d 162, 171 (2d Cir. 2000) (applying exception to factual finding that led sentencing judge to exercise his discretion to impose a more severe sentence)). The Fourth Circuit applies the exception to noncapital sentencing "only in the context of eligibility for application of a career offender or other habitual offender guideline provision." *Id.* at 16a (quoting *United States* v. *Mikalajunas*, 186 F.3d 490, 495 (4th Cir. 1999), cert. denied, 529 U.S. 1010 (2000)). Rejecting the broader rule adopted by the Second Circuit in *Spence*, the court of appeals "agree[d] with the Fourth Circuit which has held that the actual innocence exception applies to non capital cases only in the context of a habitual offender finding." Pet. App. 14a.

The court of appeals subsequently denied the State's petition for rehearing en banc. Pet. App. 21a-29a.

SUMMARY OF ARGUMENT

A. A prisoner generally may not raise a procedurally defaulted claim on habeas corpus unless he establishes both "cause" for the default and "actual prejudice" from the asserted error. There is, however, a narrow exception to that rule in the rare situation where the prisoner can show that he is "actually innocent." Because a prisoner's innocence of the crime of which he was convicted is both a compelling injustice and an extremely rare occurrence, allowing collateral review in that circumstance appropriately balances society's interest in finality, comity, and conservation of judicial resources and the individual's interest in avoiding a fundamentally unjust incarceration. This case presents the question whether the actual innocence exception should be extended to the situation where a prisoner claims innocence of a noncapital sentence. It should not.

B. "Innocence" ordinarily means that a defendant is not guilty of a substantive crime. The Court has applied the actual innocence exception to capital sentencing, while acknowledging that the concept of innocence is not easily applied to sentencing. The capital sentencing context, however, is unique. Concepts of "innocence" and "error" make little sense in traditional noncapital sentencing because the sentencer makes a highly discretionary choice among a range of possible sentences. Where there is no standard limiting the sentencer's discretion, there is no "correct" sentence for the defendant, and a defendant cannot be innocent of the sentence imposed unless he is innocent of the underlying crime.

C. Contemporary noncapital sentencing sometimes involves significant limits on a sentencer's discretion. The concept of an erroneous sentence can be given more meaning in such sentencing schemes, because specific factual findings, which can be identified as either true or false, may have a demonstrable impact on a defendant's sentence. Nonetheless, extension of the actual innocence exception to the myriad facts that have an impact on noncapital sentences is unwarranted. If the actual innocence exception applied to any factual finding that has a demonstrable impact on a noncapital sentence, the exception would no longer be limited to situations involving a compelling injustice. As the lower degree of constitutional protection applicable at sentencing reflects, the injustice of an erroneous sentence within statutory maximum and minimum bounds presents significantly less concern than the paradigmatic injustice of conviction of an innocent person. Applying the actual innocence exception to all factual findings that have an impact on noncapital sentences would also mean that the exception would no longer be limited to the rare case, because challenges to the factual findings made at sentencing are quite common.

D. More limited applications of the actual innocence exception to noncapital sentencing would either be unworkable or still impose unacceptable costs. The court of appeals here and the Fourth Circuit have proposed that the exception

apply only to sentencing findings concerning a defendant's habitual or career offender status. But there is no logical reason why a defendant can be "actually innocent" of such findings but not of other findings that are equally capable of being erroneous and may have just as great an impact on the defendant's sentence.

There would be a logical basis to limit the actual innocence exception to recidivist findings that raise the statutory maximum sentence, but applying the exception to such findings would still impose unacceptable costs on the criminal justice system. Findings that increase the statutory maximum, unlike findings that increase the mandatory minimum or the presumptive sentencing range under a guidelines system, expose the defendant to a greater sentence than he is otherwise eligible to receive. The actual innocence exception probably already applies to facts other than recidivism that increase the statutory maximum because those facts are elements of an aggravated substantive offense—either because the legislature has designated them as offense elements or because the Constitution requires that they be treated that way. *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000).

But facts concerning recidivism remain sentencing factors and need not be made elements even if they raise the statutory maximum. *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998). The balance between the societal interest in obtaining closure to the criminal process and the individual interest in avoiding fundamental injustice would be upset by extending the actual innocence exception to recidivism-based sentencing factors. Because they are not offense elements, those sentencing findings do not involve the unique stigma and collateral consequences entailed by conviction of a separate offense. Moreover, recidivist enhancements are common, and therefore extension of the

actual innocence exception to cover them would have significant costs.

E. This Court's decisions applying the actual innocence exception to the death penalty do not require extension of the exception to noncapital sentencing. To the contrary, the death penalty decisions are consistent with the principle that a defendant can be actually innocent only of a substantive offense. In light of the Court's recent decisions applying *Apprendi* in the capital sentencing context, the cases recognizing actual innocence of the death penalty are best understood as involving actual innocence of the aggravated offense of death-eligible murder. See *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 111-112 (2003) (plurality opinion); *Ring* v. *Arizona*, 536 U.S. 584, 609 (2002). Moreover, because of the unique severity and finality of the death penalty, an erroneous capital sentence represents a significantly greater injustice than an erroneous noncapital sentence. And because capital sentences are relatively rare, substantial claims of error in capital sentencing are likely to be less frequent than claims of noncapital sentencing error. But extending the actual innocence exception to routine noncapital sentencing would disrupt the balance reflected in the exception between the interest in obtaining finality in the criminal process and the interest in ensuring justice in the individual case.

ARGUMENT

THE ACTUAL INNOCENCE EXCEPTION DOES NOT APPLY TO NONCAPITAL SENTENCING

When a prisoner fails to raise a claim on direct review, the claim is deemed procedurally defaulted. A prisoner generally may not raise a defaulted claim on collateral review unless he establishes both "cause" for the default and "actual prejudice" from the asserted error. See *United States* v. *Frady*, 456 U.S. 152, 167 (1982); *Wainwright* v. *Sykes*, 433

U.S. 72, 87 (1977). There is, however, an exception to the cause-and-prejudice requirement in the "extraordinary case" where the prisoner makes a persuasive showing that he is "actually innocent." *Murray* v. *Carrier*, 477 U.S. 478, 496 (1986).

This case concerns the scope of the actual innocence exception. The Court has explained that the "prototypical" example of actual innocence is when the prisoner is innocent of the criminal offense of which he has been convicted. *Sawyer* v. *Whitley*, 505 U.S. 333, 340 (1992). The Court has also applied the exception to capital sentencing and has held that review of a defaulted claim is permissible if a capital prisoner is actually innocent of the elements that render him statutorily eligible for the death penalty. *Id.* at 347. The question presented here is whether the actual innocence exception should be extended to noncapital sentencing. It should not.

A. "Actual Innocence" Is A Narrow Exception To The Rule That Defaulted Claims May Not Be Raised On Collateral Review

1. Habeas corpus has significant societal costs

The right to petition a federal court for a writ of habeas corpus is "one of the centerpieces of our liberty." *McCleskey* v. *Zant*, 499 U.S. 467 (1991). The writ, which has its roots in the English common law and is mentioned in the Constitution, Art. I, § 9, Cl. 2, serves as "a bulwark against convictions that violate fundamental fairness." *Engle* v. *Isaac*, 456 U.S. 107, 126 (1982) (citation and internal quotation marks omitted). Nonetheless, collateral review of criminal convictions entails "profound societal costs." *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998) (quoting *Smith* v. *Murray*, 477 U.S. 527, 539 (1986)).

Most significant, collateral review undermines the finality of criminal judgments. As a result, it "extends the ordeal of

trial for both society and the accused." *Isaac*, 456 U.S. at 126-127. The absence of finality interferes with the government's ability to exact retribution for crimes because it prevents the government from executing the moral judgments reflected in criminal convictions. *Thompson*, 523 U.S. at 556. The absence of finality also frustrates deterrence and rehabilitation. Effective deterrence depends on the expectation that punishment will be swift and sure, and successful rehabilitation requires the defendant to accept that he is justly subject to sanction and that he needs to be rehabilitated. See *Isaac*, 456 U.S. at 127-128 n.32.

Ready availability of habeas corpus also may diminish the sanctity of the constitutional safeguards against wrongful conviction and punishment by suggesting to participants in criminal prosecutions that there is less need to adhere to those safeguards during the prosecutions themselves because any errors will be corrected later. See *Isaac*, 456 U.S. at 127; *Thompson*, 523 U.S. at 555. Moreover, "writs of habeas corpus frequently cost society the right to punish admitted offenders" because the passage of time, with the consequent erosion of memory and dispersion of witnesses, may render retrial difficult or impossible. *Isaac*, 456 U.S. at 127-128; see *McCleskey*, 499 U.S. at 491. And collateral review consumes scarce federal judicial resources that might otherwise be devoted to resolving primary disputes. *Ibid.*

Collateral review of state convictions also threatens principles of comity and federalism. *Schlup* v. *Delo*, 513 U.S. 298, 318 (1995). Review of state court judgments by lower federal courts "frustrate[s] both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Isaac*, 456 U.S. at 128. Comity and federalism costs are particularly high when a state prisoner seeks federal habeas review of a claim that the prisoner neglected to raise on direct review in the state courts. The state courts are deprived of the opportunity to correct their

own errors and to avoid federal intrusion. Moreover, the intrusion on state sovereignty is magnified because federal review not only revisits state court judgments but also denies the State the ability to enforce its procedural rules. See *id.* at 128-129; *Sykes*, 433 U.S. at 87-90.

2. Actual innocence is a rare exception to temper the usual rule that a defaulted claim cannot be raised on habeas

Because of the substantial costs of habeas review of defaulted claims, this Court has imposed stringent limits on a federal court's discretion to entertain such claims. Consideration of defaulted claims is permitted only where necessary to correct "a fundamentally unjust incarceration." *Isaac*, 456 U.S. at 135. A prisoner generally may obtain habeas review of a defaulted claim only if he can show "cause" for his default and "actual prejudice" from the asserted error. *Sykes*, 433 U.S. at 88-91; see *Frady*, 456 U.S. at 167 (applying same rule to federal prisoners seeking collateral relief).

The Court has expressed confidence that, in most cases, "victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard." *Carrier*, 477 U.S. at 496 (quoting *Isaac*, 456 U.S. at 135). At the same time, the Court has recognized that there may be "an extraordinary case" in which it would be fundamentally unfair not to afford relief to a prisoner even though he cannot satisfy the cause-and-prejudice test. *Ibid.* Accordingly, the Court has held that a prisoner can obtain habeas review, even absent a showing of cause and prejudice, if he can establish that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Ibid.*; accord *Bousley* v. *United States*, 523 U.S. 614, 623 (1998).

The actual innocence exception is a "'safety valve' for the 'extraordinary case'" where it is necessary to prevent a fundamental miscarriage of justice. *Schlup*, 513 U.S. at 333

(O'Connor, J., concurring) (citation omitted). The Court has employed the same "actual innocence" safety valve in other circumstances where concerns about finality, comity, and scarce judicial resources require stringent limits on the power of the federal courts to grant collateral relief. In *Kuhlmann* v. *Wilson*, 477 U.S. 436, 454 (1986), a plurality of the Court reasoned that, under the then-existing version of 28 U.S.C. 2244(b), federal courts should not consider a successive habeas petition unless the prisoner supplements the claim raised in the petition with "a colorable showing of factual innocence." In *McCleskey*, the Court held that a prisoner filing a second habeas petition cannot obtain relief if he has "abused the writ" by including a claim that he could have brought in a prior petition unless he can show either cause and prejudice or that he is "innocent of the crime" of which he was convicted. 499 U.S. at 494. And, in *Thompson*, the Court held that a federal court may not recall its mandate to revisit the merits of an earlier decision denying habeas relief unless the prisoner has made "a strong showing of 'actua[l] innocen[ce]." 523 U.S. at 557 (quoting *Carrier*, 477 U.S. at 496).

The Court has "often emphasized 'the narrow scope' of the exception." *Thompson*, 523 U.S. at 559.[3] Indeed, the Court has explained that it tied the exception to the petitioner's innocence for the very purpose of ensuring that the exception would allow relief rarely and only for the "truly deserving." *Schlup*, 513 U.S. at 321. A prisoner has an "overriding 'interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated.'" *Ibid.*

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[3] See *Schlup*, 513 U.S. at 321 ("rare" and applicable "only" to the "extraordinary case"); *Sawyer*, 505 U.S. at 341 ("very narrow"); *McCleskey*, 499 U.S. at 494 (applies to a "narrow class of cases"); *Dugger* v. *Adams*, 489 U.S. 401, 412 n.6 (1989) (applies only to the "extraordinary case"); *Carrier*, 477 U.S. at 496 (same); *Kuhlmann*, 477 U.S. at 454 (permits review "only in rare cases").

(quoting *Kuhlmann*, 477 U.S. at 452 (plurality opinion)). At the same time, petitions for collateral relief in which a prisoner can make that contention are extremely unusual. *Id.* at 321-322 & n.36.[4] The narrowness of the actual innocence exception thus reflects a careful balance between the societal interests in finality, comity, and conservation of judicial resources and the individual interest in doing justice in the extraordinary case. *Ibid.*; *id.* at 324.

B. A Prisoner Cannot Logically Be Described As Actually Innocent Of A Discretionary Noncapital Sentence

As this Court has noted, the "prototypical example of 'actual innocence' in a colloquial sense is the case where the State has convicted the wrong person of the crime." *Sawyer*, 505 U.S. at 340. In traditional legal terminology as well, "innocence" generally refers to a defendant's lack of guilt of a substantive crime rather than his failure to deserve or his ineligibility for a particular sentence. See *Black's Law Dictionary* 708 (5th ed. 1979) (defining "innocent" as "[f]ree from guilt"); *id.* at 637 (defining "guilty" as "[h]aving committed a crime or tort" and "[r]esponsible for a delinquency, crime, or other offense").

Consistent with an offense-based understanding of actual innocence, the plurality in *Kuhlmann* described the exception as involving someone who is "innocent of the charge for which he was incarcerated." 477 U.S. at 452. The Court in *McCleskey* described the exception as covering someone who is "innocent of the crime" of which he was convicted.

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[4] "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623. A prisoner who asserts his actual innocence of the crime of which he was convicted must show that, in light of all the evidence, "it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327. The government may seek to rebut that showing with "any admissible evidence of * * * guilt," *Bousley*, 523 U.S. at 624, even if the evidence was not introduced at trial.

499 U.S. at 494. And the description in *Carrier* of the exception as involving the "*conviction* of one who is actually innocent" also appears to focus on innocence of a crime. 477 U.S. at 496 (emphasis added).

The "notion that one can be actually innocent of a sentence, although guilty of the underlying crime" is an "awkward" one. *Cristin* v. *Brennan*, 281 F.3d 404, 421 (3d Cir.), cert. denied, 537 U.S. 897 (2002). Unlike the determination whether someone has committed a crime, the imposition of sentence does not involve a decision whether the defendant is "guilty" or "innocent." Rather, the imposition of sentence entails the calculation of the punishment that befits the crime of which the defendant has already been found guilty.

This Court has applied the concept of actual innocence to capital sentencing. See *Smith*, 477 U.S. at 537-539; *Sawyer*, 505 U.S. at 339-347. In so doing, however, the Court has acknowledged that "[t]he phrase 'innocent of death' is not a natural usage of those words." *Id.* at 341. The Court has also explained that the concept of actual innocence "does not translate easily" into the sentencing context. *Smith*, 477 U.S. at 537. The Court therefore "struggled to define 'actual innocence'" of a capital sentence. *Schlup*, 513 U.S. at 323. The Court did so by "striv[ing] to construct an analog to the simpler situation represented by the case of a noncapital defendant" who is not guilty of the crime of which he has been convicted. *Sawyer*, 505 U.S. at 341. The Court concluded that "the 'actual innocence' requirement must focus on those elements that render a defendant eligible for the death penalty." *Id.* at 347. Therefore, the Court held that, to establish "actual innocence" of a death sentence, a prisoner "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found [him] eligible for the death penalty under the applicable state law." *Id.* at 336.

The Court has, however, never applied the concept of "actual innocence" to a noncapital sentence. Indeed, the Court's discussion in *Sawyer* suggests that the Court did not understand the concept to apply in the noncapital sentencing context. That inference follows from the Court's assertions that "the case of a noncapital defendant" represents a "simpler situation" and that, "[i]n the context of a noncapital case, the concept of 'actual innocence' is easy to grasp." 505 U.S. at 341. Presumably, the Court was referring to what it had earlier described as the "prototypical example" of "where the State has convicted the wrong person of the crime." *Id.* at 340.

Concepts of "innocence" and "error" make little sense in traditional noncapital sentencing, in which the sentencer makes a highly discretionary choice among a range of possible sentences. See *Bullington* v. *Missouri*, 451 U.S. 430, 443-444 (1981); *United States* v. *DiFrancesco*, 449 U.S. 117, 136-137 (1980). Where there is no standard limiting the discretion of the sentencer, there is no "correct" sentence for the defendant. Thus, when a sentencing scheme is wholly discretionary, a defendant's "innocence" of his sentence can have no meaning independent of his innocence of the underlying crime.

C. Applying The Actual Innocence Exception To All Factual Findings With A Demonstrable Impact On Noncapital Sentences Would Encroach Unacceptably On Finality, Comity, And Scarce Judicial Resources

Contemporary noncapital sentencing sometimes involves significant limits on the sentencer's discretion. In the federal system, the discretion of sentencing judges is constrained by the United States Sentencing Guidelines. See *Stinson* v. *United States*, 508 U.S. 36, 42 (1993). Factual findings at sentencing may raise the defendant's offense level or criminal history category and trigger a higher sentencing range within the statutory maximum. See Sentencing Guidelines Chs. 3, 4; Sentencing Table. In both the federal and the state systems, other factual findings may also constrain the sentencer's discretion. Certain facts, such the defendant's use of a firearm, may increase the mandatory minimum sentence specified by statute. See, *e.g.*, *Harris* v. *United States*, 536 U.S. 545 (2002). Other facts, such as those concerning prior convictions, may, as in this case, shift the applicable sentencing range or increase in the statutory maximum. See, *e.g.*, *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998).

It is easier to understand how the concept of an erroneous sentence could be applied to those more determinate sentencing schemes than to traditional discretionary sentencing. Specific factual findings can be identified as either true or false, and those findings may have a demonstrable impact on the defendant's sentence. Extension of the actual innocence exception to the myriad facts that have an impact on noncapital sentences would, however, unmoor the exception from its roots as a safety valve that applies only in extraordinary cases where necessary to prevent a fundamental miscarriage of justice.

If the actual innocence exception were to apply to any factual finding that has a demonstrable impact on a noncapital sentence, the exception would no longer be limited to situations involving a compelling injustice. As this Court has recognized, there is a "significant difference between the injustice that results from an erroneous conviction and the injustice that results from an erroneous sentence." *Schlup*, 513 U.S. at 326 n.44. A determination of guilt does more than authorize the government to impose punishment; it brands the person found guilty with a virtually indelible stigma in the eyes of his community and carries enormous collateral consequences. See, *e.g.*, *Ball* v. *United States*, 470 U.S. 856, 865 (1985); *Missouri* v. *Hunter*, 459 U.S. 359, 373 (1983) (Marshall, J., dissenting); *Price* v. *Georgia*, 398 U.S.

323, 331 n.10 (1970). For that reason, "the individual interest in avoiding injustice is most compelling in the context of actual innocence" of a substantive crime. *Schlup*, 513 U.S. at 324.

The lesser injustice involved in an erroneous sentence is reflected in the lower degree of constitutional protection applicable at sentencing. See *Schlup*, 513 U.S. at 326 n.44. The government must prove guilt of a substantive offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361-364 (1970). Proof at trial is subject to the Confrontation Clause of the Sixth Amendment; and, for serious offenses, the defendant is entitled to a trial by jury. The sentencing process, in contrast, is "less exacting than the process of establishing guilt." *Nichols* v. *United States*, 511 U.S. 738, 747 (1994). Generally, a noncapital sentence may be based on facts found by the sentencing court by a preponderance of the evidence. See *Harris*, 536 U.S. at 558; cf. *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). And the Confrontation Clause does not limit the evidence that the sentencer may consider. Rather, the sentence may be based on "the fullest information possible concerning the defendant's life and characteristics." *Williams* v. *New York*, 337 U.S. 241, 247 (1949).

If the actual innocence exception were to apply to noncapital sentences, the exception would also no longer be limited to the extraordinary case. As this Court has noted, "experience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare." *Schlup*, 513 U.S. at 324. In contrast, challenges to the factual findings made at sentencing are not uncommon. Statistics maintained by the United States Sentencing Commission show, for example, that, in federal sentencing appeals in fiscal year 2001, defendants raised 532 challenges to the district court's determination of the quantity of drugs attributable to the defendant, and 361

challenges to the district court's determination of the defendant's role in the offense, as well as hundreds of other factual challenges. United States Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics* (2001) (Table 59) (available at <*http://www.ussc.gov/ANNRPT/2001/SBTOC01.htm*>). If a defendant could claim actual innocence of any factual finding that led to an increase in his sentence, "the actual innocence exception would swallow the rule that issues not raised on appeal cannot be considered [on collateral attack] absent a showing of cause and prejudice to excuse the default." *United States* v. *Mikalajunas*, 186 F.3d 490, 494 (4th Cir. 1999), cert. denied, 529 U.S. 1010 (2000). Innocence claims "relating only to sentencing" thus pose a significantly greater "threat to judicial resources, finality, and comity" than claims of innocence of a substantive offense. *Schlup*, 513 U.S. at 324.

D. More Limited Applications Of The Actual Innocence Exception To Noncapital Sentencing Either Are Unworkable Or Would Still Impose Unacceptable Costs On The Criminal Justice System

1. There is no basis for limiting "actual innocence" to habitual or career offender findings or based on the length of the alleged sentencing error

Because an unlimited extension of the actual innocence exception to noncapital sentencing would impose unacceptable burdens on finality, comity, and scarce federal judicial resources, the Fourth and Fifth Circuits have proposed that the exception should apply only to sentencing findings concerning a defendant's habitual or career offender status. See *Mikalajunas*, 186 F.3d at 495; Pet. App. 16a. There is, however, no logical reason why a defendant should be able to establish "actual innocence" of a sentence that was enhanced based on habitual or career offender status but unable to establish "actual innocence" of a sentence that was enhanced based on some other factual finding. Other factual findings

are equally capable of being erroneous. And the effect of a habitual offender finding on the length of a defendant's sentence will not necessarily be greater than the effect of any other finding. Compare, *e.g.*, *Mikalajunas*, 186 F.3d at 492 (erroneous enhancement for restraint of victim resulted in 52 month increase) with *United States* v. *Maybeck*, 23 F.3d 888, 894 (4th Cir. 1994) (erroneous habitual offender enhancement resulted in increase of between three and 55 months), cert. denied, 517 U.S. 1161 (1996).

Other attempts at limiting the scope of an actual innocence exception for noncapital sentencing are also unlikely to prove workable. For example, it would not be practicable to limit the scope of the exception based on the extent of the increase in the defendant's sentence. As this Court noted in rejecting a length-of-sentence limitation on "prejudice" for ineffective-assistance-of-counsel claims, "there is no obvious dividing line by which to measure how much longer a sentence must be for the increase to constitute substantial prejudice. Indeed, it is not even clear if the relevant increase is to be measured in absolute terms or by some fraction of the total authorized sentence." *Glover* v. *United States*, 531 U.S. 198, 204 (2001).

2. The actual innocence exception should not be extended to recidivist findings that increase the statutory maximum sentence

A slightly more feasible way to limit the scope of the actual innocence exception, if it were applied to noncapital sentencing, would be to apply the exception only to recidivist sentencing factors that increase the statutory maximum sentence. But that limitation, although it would be administrable, would still impose unacceptable costs on the criminal justice system.

a. There is a logical basis on which to distinguish between findings that raise the statutory maximum sentence and other findings that result in a longer sentence, such as

findings that increase the mandatory minimum or the applicable sentencing range under the federal Sentencing Guidelines. Unlike a finding that increases the statutory maximum, a finding that increases the mandatory minimum sentence does not make the defendant eligible for any sentence for which he was not already eligible. Similarly, because of the robust departure authority under the Guidelines, a defendant may be eligible to receive a sentence above his sentencing range, see 18 U.S.C. 3553(b); *Koon* v. *United States*, 518 U.S. 81, 92-96, 98 (1996), but he is never eligible to receive a sentence greater than the statutory maximum.

Moreover, the actual innocence exception would appear already to apply to facts other than recidivism that increase the statutory maximum sentence. Such facts are elements of an aggravated substantive offense—either because the legislature has designated them as offense elements or because the Constitution requires that they be treated that way. In *Apprendi*, the Court held that, as a matter of constitutional law, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. The Court explained that such a fact is "the functional equivalent of an element of a greater offense." *Id.* at 494 n.19.

The actual innocence exception likely applies to the situation where a defendant who has been convicted of an aggravated offense later establishes that a factual finding necessary to support the greater offense was erroneous. In that circumstance, the defendant is reasonably understood as "actually innocent" of the greater offense even though he remains guilty of a lesser included offense. See, *e.g.*, *In re Minarik*, 166 F.3d 591, 607 (3d Cir. 1999) (assuming that "actual innocence" applies to the situation where new evidence would show the petitioner not guilty of first degree murder though guilty of some lesser offense). Cf. *Frady*, 456

U.S. at 171 (discussing the possibility that the defendant could be "innocent" of murder although guilty of manslaughter).

Application of the actual innocence exception to defendants who are innocent of an aggravated offense but guilty of a lesser offense is somewhat more difficult to justify than application of the exception to defendants who are entirely innocent. It imposes a greater burden on the finality of criminal convictions, state court autonomy, and judicial resources. In addition, the injustice of an erroneous conviction for an aggravated offense is less severe than the injustice of the erroneous conviction of someone who is "entirely innocent." *Schlup*, 513 U.S. at 325. Nonetheless, as described above, our criminal justice system accords special weight to the determination of guilt or innocence of a substantive offense, and criminal law "is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability." *Mullaney* v. *Wilbur*, 421 U.S. 684, 697-698 (1975). The constitutional protections associated with the determination of guilt or innocence apply with full force whether the question is the defendant's guilt of any offense or his guilt of an aggravated offense. See *Apprendi*, *supra*. Likewise, application of the actual innocence exception to aggravated offenses does not upset the balance between the societal interests in finality, comity, and conservation of judicial resources and the individual interest in protection from fundamental unfairness embodied by the exception.

b. Not all facts that increase the statutory maximum sentence, however, are offense elements. The Court expressly limited its holding in *Apprendi* to facts that do not concern recidivism. See *Apprendi*, 530 U.S. at 487-490. That limitation reflects the fact that there is a long tradition of treating recidivism as a sentencing factor rather than an offense element, as the Court recognized in *Almendarez-Torres*. The balance between the societal interest in obtaining

closure to the criminal process and the individual interest in avoiding fundamental injustice would be upset by extension of the actual innocence exception to facts that, even though they expose the defendant to a longer term of imprisonment, are sentencing factors rather than offense elements.[5]

Extension of the actual innocence exception to such recidivist sentencing enhancements is not justified by the considerations that support applying the exception to aggravated offenses. Imposition of a sentencing enhancement does not involve a finding of guilt of a greater offense, which, as explained above, carries a unique stigma and collateral consequences. Moreover, because recidivist sentencing enhancements are quite common, extension of the actual innocence exception to those enhancements would have significant costs. At least 49 States and the District of Columbia have recidivism laws that provide for increases in statutory maximum sentences.[6] The federal government also has

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[5] A holding that the actual innocence exception applies only to sentencing factors that raise the statutory maximum would be different from the Fourth and Fifth Circuit's rule applying the exception to *all* habitual and career offender findings. An exception limited to maximum-increasing factors would not apply to habitual or career offender findings that do not increase the statutory maximum, such as findings under Sentencing Guideline § 4B1.1. See *Maybeck*, *supra* (Fourth Circuit decision applying exception to habitual offender finding under Guidelines).

[6] See, *e.g.*, Ala. Code § 13A-5-9 (Supp. 2001); Alaska Stat. § 12.55.125(*l*) (Michie 2002); Ariz. Rev. Stat. Ann. § 13-604 (West 2001); Ark. Code Ann. § 5-4-501 (Michie Supp. 1995); Cal. Penal Code § 667 (West 1999); Colo. Rev. Stat. Ann. § 16-13-101 (2001); Conn. Gen. Stat. Ann. § 53a-40 (West 2001); Del. Code Ann. tit. 11, § 4214 (2003); D.C. Code Ann. § 22-1804 (2001); Fla. Stat. Ann. § 775.084 (West Supp. 2003); Ga. Code Ann. § 17-10-7 (1997); Haw. Rev. Stat. § 706-661 (Supp. 2000); Idaho Code Ann. § 19-2514 (West 1997); 720 Ill. Comp. Stat. Ann. 5/33B-1 (West 2003); Ind. Code Ann. § 35-50-2-8 (West 2003); Iowa Code Ann. § 902.9 (West Supp. 2003); Kan. Stat. Ann. § 21-4504 (1995); Ky. Rev. Stat. Ann. § 532.080 (Michie 1999); La. Rev. Stat. Ann. § 15:529.1 (West Supp. 2003); Me. Rev. Stat. Ann. tit. 17-A, § 1252(4-A) (West Supp. 2002); Md. Code Ann., Crim. Law §

many recividist provisions that provide for increases in the statutory maxima.[7]

Qualification for enhancements under recidivist provisions often involves a number of subsidiary findings, which are sometimes quite technical. For example, in this case, the erroneous factual finding on which petitioner bases his actual innocence claim is not the existence of his two prior felony convictions but rather the sequential nature of those convictions, *i.e.*, that one of the convictions became final before he committed the second. Application of the actual innocence exception to recidivist enhancements that raise statutory maximum sentences would thus permit belated reexamination in any number of cases of numerous and sometimes technical findings that relate only to the length of the habeas petitioner's sentence. The exception would no longer

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14-101 (2002); Mass. Gen. Laws ch. 266, § 40 (2002); Mich. Comp. Laws Ann. § 769.12 (West 2000); Miss. Code Ann. § 99-19-83 (1999); Mo. Ann. Stat. § 558.016 (West 1999); Mont. Code Ann. § 46-18-219 (2001); Neb. Rev. Stat. Ann. § 29-2221 (Michie 2003); Nev. Rev. Stat. Ann. §§ 207.010, 207.012, 207.014 (Michie 2001); N.H. Rev. Stat. Ann. § 651:6 (Supp. 2003); N.J. Stat. Ann. § 2C:43-7.1 (West 1995); N.M. Stat. Ann. § 31-18-23 (Michie Supp. 2002); N.Y. Penal Law § 70.08 (McKinney 1998); N.C. Gen. Stat. §§ 14-7.7, 14-7.8, 14-7.12 (2002); N.D. Cent. Code § 12.1-32-09 (Supp. 2003); Ohio Rev. Code Ann. §§ 2929.11, 2929.14(D)(2)(b) (Anderson 2002); Okla. Stat. Ann. tit. 21, § 51.1 (West 2002); Or. Rev. Stat. § 161.725 (2001); 42 Pa. Cons. Stat. Ann. § 9714 (West Supp. 2003); R.I. Gen. Laws § 12-19-21 (2002); S.C. Code Ann. § 17-25-45 (Law Co-op Supp. 2002); S.D. Codified Laws § 22-7-8 (Michie 1998); Tenn. Code Ann. §§ 40-35-107, 40-35-120 (2003); Tex. Penal Code Ann. §§ 12.35(c), 12.42 (West 2003); Utah Code Ann. § 76-3-203.5 (Supp. 2003); Vt. Stat. Ann. tit. 13, § 11 (1998); Va. Code Ann. § 19.2-297.1 (Michie 2000); Wash. Rev. Code Ann. § 9.94A.570 (West 2003); W. Va. Code § 61-11-18 (2000); Wis. Stat. Ann. § 939.62 (West 1996 & Supp. 2002); Wyo. Stat. Ann. § 6-10-201 (Michie 1998).

[7] See, *e.g.*, 18 U.S.C. 924(e), 1028(b)(3)(C), 1365(f)(2), 1864(c), 2247(a), 2251(d), 2252(b), 2252A(b), 2260(c)(2), 2701(b)(1)(B) and (b)(2)(B); 21 U.S.C. 841(b)(2), 842(c)(2)(B), 843(d)(1) and (2), 844(a), 849(c), 859(b), 860(b), 861(c), 960(b), 962.

be limited to the "extraordinary case"; nor would it be limited to instances involving a fundamental miscarriage of justice.

3. Existing means of overcoming procedural defaults are adequate without creating a new category of "actual innocence" challenges

Because there is no administrable way to apply the actual innocence exception to noncapital sentencing that will not result in unjustified societal costs, the Court should hold that the exception does not apply to noncapital sentencing. Such a holding, however, will not mean that habeas petitioners will never be able to raise procedurally defaulted claims. To the contrary, prisoners will still be able to raise defaulted claims if they satisfy the cause-and-prejudice standard.

The cause-and-prejudice standard will permit review of defaulted sentencing errors where review is warranted. A prisoner will satisfy the cause-and-prejudice standard whenever he would have had a viable actual innocence claim, and his default resulted from ineffective assistance of counsel. For example, respondent may have a valid claim that his trial counsel was ineffective in failing to object to the lack of evidence to support the habitual offender enhancement in this case. Indeed, respondent raised that claim in the district court. The magistrate judge declined to rule on the claim because she recommended relief from the erroneous enhancement based on actual innocence. See Pet. App. 8a n.9, 51a. If respondent preserved the ineffective assistance argument, he may well be able to obtain review of his defaulted claim on remand.

Like actual innocence, cause and prejudice is a "gateway" through which a prisoner must pass to obtain review of an independent underlying claim. See *Herrera* v. *Collins*, 506 U.S. 390, 404 (1993). Even if respondent passes through the gateway, he must prove an underlying claim of a "violation of the Constitution or laws or treaties of the United States" to

obtain habeas relief. 28 U.S.C. 2241(c)(3). If respondent preserved his ineffective assistance claim, that claim could, in addition to supplying cause for his default, serve as the underlying claim entitling him to habeas relief.[8]

E. This Court's Cases Applying The Actual Innocence Exception To The Death Penalty Do Not Require That The Exception Also Apply To Noncapital Sentencing

1. This Court's decisions applying the actual innocence exception in the death penalty context do not require extension of the exception to noncapital sentencing. To the contrary, the death penalty decisions are consistent with the principle that a defendant can be actually innocent only of a substantive offense. In light of the Court's recent decisions applying *Apprendi* in the capital sentencing context, the cases recognizing actual innocence of the death penalty are best understood as involving actual innocence of an aggravated offense.

In *Sawyer*, the Court held that a defendant can show actual innocence of the death penalty only if he shows that no

[8] The court below did not grant relief on that claim but on a claim of insufficient evidence to support the sentencing enhancement. See Pet. App. 17a-19a. This Court has recognized a constitutional claim of insufficient evidence to support conviction of an offense. See *Jackson* v. *Virginia*, 443 U.S. 307 (1979). As far as the government is aware, however, the Court has not yet recognized a comparable claim based on insufficient evidence to support a sentencing enhancement. The Court has held that it violates due process for a defendant who is not represented by counsel to be sentenced based on "assumptions concerning his criminal record which were materially untrue." *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948). The Court has also ordered resentencing where the sentence was "founded at least in part upon misinformation of constitutional magnitude" because it was based on prior convictions that were imposed in cases in which the defendant was not represented by counsel. See *United States* v. *Tucker*, 404 U.S. 443, 447 (1972); cf. *Custis* v. *United States*, 511 U.S. 485 (1994). But petitioner was represented by counsel at his sentencing and in the cases that resulted in his prior felony convictions.

reasonable jury would have found the aggravating circumstances necessary for him to be eligible for the death penalty under state law. 505 U.S. at 336. At the time that the Court decided *Sawyer*, the Court viewed those aggravating circumstances as "elements of the capital sentence" rather than elements of an aggravated offense. See *id.* at 345. Nonetheless, the Court decided that the actual innocence inquiry must focus on the "elements that render a defendant eligible for the death penalty" (*id.* at 347) because the Court was "striv[ing] to construct an analog to the simpler situation represented by the case of a noncapital defendant" innocent of a crime (*id.* at 341).

Recent cases have confirmed the Court's intuition in *Sawyer* that the aggravating circumstances that render a defendant statutorily eligible for a death sentence are analogous to the elements of a substantive offense. In *Ring* v. *Arizona*, 536 U.S. 584 (2002), the Court held that aggravating circumstances that cause a defendant convicted of first-degree murder to be eligible for the death penalty must be found by a jury because they "operate as 'the functional equivalent of an element of a greater offense.'" *Id.* at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19). As a plurality of the Court explained in *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 111-112 (2003), "in the post-*Ring* world," first-degree murder "is properly understood to be a lesser included offense of 'first-degree murder plus aggravating circumstance(s).'" Thus, the Court's cases applying the actual innocence exception to capital sentencing are properly understood as applying the exception to the situation in which a defendant is innocent of the greater offense of "first degree murder plus aggravating circumstance(s)." *Ibid.*[9]

[9] In *Sawyer*, the Court held that a defendant must show actual innocence of a capital sentence by "clear and convincing evidence." 505 U.S. at 348. In *Schlup*, however, the Court held that a prisoner may prove actual

A defendant cannot, however, claim actual innocence of a substantive offense based on the fact that his noncapital sentence was enhanced by an erroneous factual finding that is not an element of any offense. For that reason, *Sawyer* and the Court's other cases applying the actual innocence exception to the death penalty do not support application of the exception to noncapital sentencing.

2. The death penalty cases also do not support application of the actual innocence exception to noncapital sentencing for a further reason. This Court has frequently recognized that there is a "qualitative difference between death and other penalties" because "the death penalty is unique in both its severity and its finality." *Monge* v. *California*, 524 U.S. 721, 732 (1998) (citations and internal quotation marks omitted). The erroneous imposition of a death sentence is therefore a far greater injustice than a noncapital sentencing error. See *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) (noting that a death sentence "differs more from life imprisonment than a 100-year prison term differs from one of only a year or two"). In addition, death sentences are imposed far less frequently than ordinary noncapital sentences. As a result, application of the actual innocence exception in the death penalty context pre-

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innocence of the underlying murder by only a preponderance of the evidence. See 513 U.S. at 327. The higher standard of proof required in *Sawyer* may reflect the Court's view at the time that death eligibility factors were sentencing considerations rather than elements of a distinct substantive offense. Alternatively, the higher standard of proof may reflect the view that habeas courts should require a greater degree of certainty that an injustice has been done when a defendant claims innocence of only an aggravated offense and does not challenge his guilt of a lesser included offense. The latter explanation is consistent with the fact that the Court in *Sawyer* applied the "clear and convincing evidence" standard to the claim that the defendant was innocent of arson, which was not only an eligibility factor but also an element of first-degree murder. See *Schlup*, 513 U.S. at 326 & n.43 (citing *Sawyer*, 505 U.S. at 342 n.8).

sents a lesser burden on finality, comity, and judicial resources than would application of the exception to noncapital sentencing.

Given the severe injustice entailed by an erroneous death sentence and the infrequency with which capital punishment is imposed, applying the actual innocence exception to capital sentencing preserves the balance reflected in the exception between the interest in obtaining closure to the criminal process and the interest in ensuring justice in the individual case. An erroneous noncapital sentence, however, is a qualitatively less significant injustice. Claims of noncapital sentencing error are also likely to occur with greater frequency because of the vastly greater number of noncapital sentences. The balance of interests thus weighs against extension of the actual innocence exception to noncapital sentencing.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Supreme Court of the United States

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Petitioner,

v.

MICHAEL WAYNE HALEY,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF OF THE STATES OF ILLINOIS, ALABAMA, ARIZONA, MISSISSIPPI, MISSOURI, NEBRASKA, OHIO, OKLAHOMA, OREGON, SOUTH DAKOTA, UTAH, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the "actual innocence" exception to the procedural default rule for federal habeas corpus claims should apply to noncapital sentencing error.

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INTEREST OF THE AMICI CURIAE

This case presents the question whether the "fundamental miscarriage of justice" exception to procedural default on federal habeas review is available to a petitioner who demonstrates "actual innocence" of his noncapital sentence. The procedural default doctrine, which is rooted in principles of comity and federalism, reflects the respect of the federal courts for state procedural rules. Further, the litigation of substantive habeas corpus claims in the federal courts taxes state resources and delays the final resolution of state criminal convictions. The States have a substantial interest both in enforcing their procedural rules and in obtaining finality to their criminal prosecutions. Any expansion of the exception to procedural default, such as that at issue in this case, runs contrary to these substantial state interests.

SUMMARY OF ARGUMENT

Principles of comity and federalism dictate that, in the ordinary case, a habeas corpus petitioner may avoid his procedural default of a claim only by showing cause and prejudice. Out of concern that the victim of a fundamental miscarriage of justice might not meet the cause and prejudice standard, this Court crafted the "actual innocence" exception to the procedural default rule. A petitioner can use actual innocence as a gateway to the review of a procedurally defaulted claim if newly discovered evidence not available at trial shows that a petitioner is actually innocent of the crime or shows that he was not eligible for a sentence of death. *Schlup v. Delo,* 513 U.S. 298 (1995); *Sawyer v. Whitley*, 505 U.S. 333 (1992). This Court has never held that a petitioner may overcome the procedural default of a claim of noncapital sentencing error by

proving "actual innocence" of a noncapital sentence. It should not do so in this case.

I. This Court's recent decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), teach that the determination of eligibility for a death sentence is not part of a sentencing proceeding—it is a trial on a "greater" capital offense. This means the Court has never held that actual innocence of a sentence is available to excuse default in *any* sentencing context, much less in a noncapital case. The policy reasons underlying the actual innocence exception dictate that the exception not be extended to sentencing proceedings.

Most importantly, there is a "significant difference between the injustice that results from an erroneous conviction and the injustice that results from an erroneous sentence." *Schlup*, 513 U.S. at 326, n.44. Indeed, it is counterintuitive even to think of a petitioner as being "innocent" of a sentence. Moreover, expanding the actual innocence exception to sentencing error would undermine the Court's oft-stated belief that the exception be applied only in the "extraordinary case." *See, e.g., Murray v. Carrier*, 477 U.S. 478, 496 (1986). Finally, expanding the actual innocence exception to noncapital sentencing error would run afoul of the Court's concern that actual innocence not amount to "little more" than the showing of prejudice needed to justify "habeas relief for many constitutional errors," and that it not undermine the requirement that a petitioner show the requisite cause to excuse procedural default. *Sawyer*, 505 U.S. at 345.

Even if, notwithstanding *Apprendi* and *Ring*, this Court considers *Sawyer* to have authorized claims of "actual innocence" of the *sentence* of death, the use of actual innocence to excuse the default of sentencing error should not move beyond the capital context. Through a long line of cases, this Court has applied greater procedural protections to death penalty proceedings than to noncapital sentencing proceedings, and has compared capital proceedings to trials on guilt or innocence. The distinctions drawn in this "death is different" jurisprudence instruct that, while a claim of actual innocence of death may be necessary to prevent a "fundamental miscarriage of justice," the same is not true as to a noncapital sentence.

II. Haley's claim of actual innocence fails for another, independent reason. This Court has stated that claims of actual innocence must be premised on new evidence that was not presented at trial. It follows that the evidence upon which an actual innocence claim is premised must also not have been previously available to a petitioner exercising due diligence. It would be inconsistent with the comity and federalism interests in finality if the rule were otherwise. Further, the AEDPA provision addressing successive habeas petitions contains a new evidence/due diligence requirement. 28 U.S.C. §2244(b)(2)(B)(i). Actual innocence claims offered to excuse default and actual innocence claims offered as an excuse to proceed with a successive petition have historically been reviewed under the same standards by this Court, and there is no reason for disparate treatment today. Haley's claim is based on evidence that was available to him at trial; indeed, it was

presented at trial. He therefore cannot avail himself of the actual innocence exception.

ARGUMENT

The "actual innocence" exception is a narrow exception to the general rules governing the default of claims by habeas corpus petitioners. Principles of comity and federalism underlie the requirement that a habeas corpus petitioner exhaust his claims in state court before turning to the federal system for relief. When a state court is given the first opportunity to correct a constitutional error that occurred at a petitioner's trial, any friction that might result from a federal habeas court overturning the decision of its state counterpart is reduced. *See* 28 U.S.C. §2254(b)(1); *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999). These principles likewise call for the habeas court to find a claim to be procedurally defaulted when the state court has disposed of it on an independent and adequate state procedural ground. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). Because the existence of an independent and adequate state ground on direct review deprives this Court of jurisdiction to review a state court's judgment, the state-law ground must also be respected on collateral review, lest habeas review provide a petitioner with an "end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws." *Id.* at 731.

Procedural default may be excused, but comity and federalism also inform this area of law. In *Wainwright v. Sykes*, 433 U.S. 72 (1977), this Court stated that the cause and prejudice standard governs whether a habeas claim can elude default. The Court abandoned the deliberate bypass standard utilized in *Fay v. Noia*,

372 U.S. 391 (1963), which had essentially given precedence to a petitioner's claims over a State's interest in its procedural rules, and limited *Fay* to its facts. *Sykes*, 433 U.S. at 88-90. The cause and prejudice standard gives "greater respect" to state rules. *Coleman*, 501 U.S. at 747.

In *Sykes*, this Court stated that the cause and prejudice standard assures that the procedural default rule "will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication *will be the victim of a miscarriage of justice*." *Sykes*, 433 U.S. at 91 (emphasis added); *see also Engle v. Isaac*, 456 U.S. 107, 135 (1982) (the Court is "confident" that a claim involving a fundamental miscarriage of justice will meet the cause and prejudice standard). In *Murray v. Carrier*, 477 U.S. 478, 496 (1986), the Court reasserted the above statement, but acknowledged that "we do not pretend that this will always be true." Therefore, "in an extraordinary case, *where a constitutional violation has probably resulted in the conviction of one who is actually innocent*, a federal habeas court may grant the writ" despite a procedural default, even in the absence of cause and prejudice, lest a fundamental miscarriage of justice occur. *Id.* (emphasis added).

Since *Carrier*, the fundamental miscarriage of justice exception has been "explicitly tied . . . to the petitioner's innocence." *Schlup v. Delo*, 513 U.S. 298, 321 (1995). Two lines of inquiry have developed—one pertaining to claims of innocence of the offense, and one pertaining to claims of ineligibility for the death penalty. In the former category, the standard applied in *Carrier*—whether it is more likely than not that no

reasonable juror would have convicted the petitioner in light of the new evidence—guides the habeas court. *Schlup*, 513 U.S. at 327-28. In the latter category, a stricter standard applies: whether the petitioner has shown by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty. *Id.* at 323; *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992). Under either standard, the court is to consider all the available evidence—both new evidence and evidence that was presented at trial—with due regard to relevant reliability concerns. *Kuhlmann v. Wilson*, 477 U.S. 436, 454, n.17 (1986) (Opinion of Powell, J.) (citing Friendly, J., *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970)) (hereafter "Friendly, J."). A claim of actual innocence in a habeas case is useful only as a "gateway" to the consideration of an otherwise defaulted claim. Independent claims of actual innocence premised on newly discovered evidence are generally not cognizable on habeas review. *Herrera v. Collins*, 506 U.S. 390, 417 (1993).

The court below held that Haley may use the actual innocence exception as a basis for excusing his default of a claim asserting a noncapital sentencing error. That judgment should be reversed for two reasons. First, the principles underlying the actual innocence exception would not be served by extending it to "innocence" of a noncapital sentence. Second, the actual innocence exception does not properly apply where—as here—the claim of actual innocence is premised on evidence that was available at trial to the petitioner.

I. The Procedural Default Of A Claim Of Noncapital Sentencing Error On Habeas Corpus Review Cannot Be Excused Under The "Fundamental Miscarriage Of Justice" Exception To Default By A Showing Of "Actual Innocence" Of The Sentence.

The court of appeals seized on the notion of "actual innocence" of eligibility for a death sentence and applied it to the context of habitual offender sentencing, reasoning that Haley should be excused from the default of a sentencing claim because he showed that he was in fact ineligible to receive an extended sentence. Pet. App. 17a. But the analogy drawn by the court of appeals was inapt. This Court's recent precedent confirms that it has never actually held that "actual innocence" of a sentence can overcome procedural default. And, given the difference between the equity concerns present when an erroneous conviction is alleged and when sentencing error is alleged, this Court should not extend the actual innocence exception to sentencing error. Finally, even if a habeas petitioner can claim "actual innocence" of a sentence, such claims should be limited to capital cases.

A. *Apprendi v. New Jersey*, 530 U.S. 466 (2000), And Its Progeny Teach That This Court Has Never Held That "Actual Innocence" Of A Sentence Can Excuse The Procedural Default Of A Sentencing Error.

In *Sawyer*, the Court rejected the suggestion that a defendant is "actually innocent" of the death penalty if he can show that "there is a 'fair probability' that" the death sentence was imposed because "constitutional error kept true mitigating evidence

from the jury." 505 U.S. at 343-44 (internal citations omitted). Instead, the Court held that a defendant can use the gateway of "actual innocence of the death penalty" only if he can show innocence of the "elements of the crime itself" or innocence of the statutory aggravating factors which qualified him for the death penalty. *Id.* at 344-45. It is now clear, in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), that the standard adopted in *Sawyer* looked to the innocence of the underlying capital offense, not innocence of a sentence (or sentencing factor).

In *Apprendi*, the Court held that the existence of a fact that increases the maximum penalty available for an offense is an element of the offense subject to the Sixth Amendment guarantee of a jury trial and the due process requirement of proof beyond a reasonable doubt. 530 U.S. at 490. In *Ring*, the Court relied on *Apprendi* to hold that the existence of an aggravating factor that renders a defendant eligible for the death penalty is also an element of an offense that must be proved to the trier of fact beyond a reasonable doubt. 536 U.S. at 609.

Justice Scalia, joined by two members of the Court, has observed that *Apprendi* and *Ring* "illuminated" the Court's jurisprudence with respect to identifying the true nature of capital sentencing proceedings. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) (opinion of Scalia, J.) (double jeopardy does not bar the imposition of the death penalty when the guilt finding at the first trial, at which the jury deadlocked as to the imposition of death and life was imposed by default, is reversed). The four dissenting Justices in *Sattazahn* likewise viewed *Apprendi* and *Ring* as teaching that

the finding of an aggravating factor authorizing the imposition of death is part of a trial on the offense itself. *Id.* at 126, n.6 (Ginsburg, J., dissenting).

In *Sawyer*, 505 U.S. at 339-40, and *Smith v. Murray*, 477 U.S. 527, 537 (1986), this Court attempted to identify what constitutes actual innocence of a death sentence. With the benefit of hindsight, and in light of *Apprendi, Ring, and Sattazahn*, it becomes apparent that this effort did not result in an extension of the actual innocence exception to sentencing proceedings. Rather, the Court identified the standards by which to assess the issue of actual innocence of "an element of a greater [capital] offense." *Ring*, 536 U.S. at 609.[1]

Here, Haley cannot rely on *Apprendi* or *Ring* to claim that he has demonstrated actual innocence of the offense. Haley's claim of innocence is that he was not sequentially convicted of two prior felony offenses. J.A.

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[1] Eventually, this Court may be called upon to decide whether justification for the different standards of review for actual innocence of the offense and actual innocence of death still exists in light of *Apprendi* and *Ring*. A related issue was presented in *Calderon v. Thompson*, 523 U.S. 538, 559 (1998), where the petitioner was convicted of rape and murder, and the rape conviction was used to qualify him for a death sentence for the murder. The petitioner sought to show both actual innocence of rape under the *Carrier/Schlup* standard, and actual innocence of rape as a sentencing enhancer, a claim subject to the more stringent *Sawyer* standard. The Court noted the "tension" between *Schlup* and *Sawyer*, in that "[i]t would be possible to vacate [the petitioner's] stand-alone conviction of rape but to let stand his conviction of murder and sentence of death." *Calderon*, 523 U.S. at 560. But the Court declined to address the anomaly, finding that the petitioner failed to meet his burden under either standard. *Id.* The instant case, likewise, does not present this Court with an opportunity to resolve that tension.

42, 47, 52-58, 61-62. In *Apprendi*, however, this Court expressly declined to hold that the jury trial guarantee and the due process requirement of proof beyond a reasonable doubt apply to the proof of a prior conviction used to enhance a sentence, reasoning that adequate constitutional protection is provided when a prior conviction is received. 530 U.S. at 488. The Court thus affirmed the continuing validity of *Almendarez-Torres v. United States*, 523 U.S. 224, 241 (1998), which held that Congress did not violate the Constitution in labeling as a sentencing factor, rather than as an element of the offense, the existence of a prior crime authorizing the imposition of a lengthier sentence.[2] Therefore, in order for Haley's actual innocence claim to succeed, this Court must, for the first time, find that actual innocence of a sentence—a noncapital sentence—constitutes a fundamental miscarriage of justice such that procedural default may be excused.

[2] It is immaterial, for purposes of concluding that prior convictions are sentencing factors (not elements) under Texas' habitual sentencing scheme, that Texas requires the prior convictions to be sequential. In *Monge v. California*, 524 U.S. 721 (1998), this Court found *Almendarez-Torres* fully applicable to California's recidivism statute, notwithstanding that the State must prove not only the commission of prior offenses, but certain facts regarding those offenses that do not necessarily appear on the face of the record. *Monge*, 524 U.S. at 728-29; *id.* at 740-41 (Scalia, J., dissenting) (acknowledging that treating "enhancement findings" under California's statute as elements of the offense would "contradict" the holding of *Almendarez-Torres*).

B. Extending The "Fundamental Miscarriage Of Justice" Exception To Defaulted Claims Of Sentencing Error Upon A Showing Of "Actual Innocence" Of The Sentence Is Unwarranted.

The policy concerns expressed in this Court's actual innocence jurisprudence counsel against extending the fundamental miscarriage of justice exception to claims of actual innocence of a sentence. The comity and federalism interests underlying the cause and prejudice standard dictate that the actual innocence exception applies only in the "extraordinary case." *Carrier*, 477 U.S. at 496. "Innocence" of a particular sentence does not constitute such a case.

In *Schlup*, the Court outlined the reasons why a claim of actual innocence of eligibility for a death sentence—now better viewed as actual innocence of the "greater" offense of capital murder—is subject to stricter scrutiny than a claim of actual innocence of the underlying conviction, or the "lesser" offense. Equity considerations, upon which the fundamental miscarriage of justice exception is based, are more compelling in a case in which guilt of the offense is at issue than in a case in which a petitioner is "alleging that his sentence is too severe." *Schlup*, 513 U.S. at 325. Simply put, there is a "significant difference between the injustice that results from an erroneous conviction and the injustice that results from an erroneous sentence." *Id.* at 326, n.44.

In addition, the Court in *Schlup* observed that claims of actual innocence of the offense are rarer than challenges to the propriety of a death sentence, claims that are "routinely asserted in capital cases." 513 U.S. at 324. As such, claims of actual innocence of the

offense are less offensive to finality and comity, and present less of a drain on judicial resources. *Id.* Though *Apprendi* and *Ring* clarified that claims of eligibility error are actually claims regarding guilt, the distinctions drawn in *Schlup* remain valid. A claim of actual innocence of a sentence is simply less compelling than a claim of actual innocence of the offense.

Moreover, this Court has recognized that "the concept of 'actual' innocence, distinct from 'legal' innocence, does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense." *Smith*, 477 U.S. at 537. Surely it is no easier to translate the concept of actual innocence into the context of an alleged error regarding a sentence of a term of years. It is counterintuitive to think of someone being "innocent" of a sentence.

Finally, the Court has expressed concern that actual innocence not amount to "little more" than the showing of prejudice needed to justify "habeas relief for many constitutional errors," and that it not undermine the requirement that a petitioner show the requisite cause to excuse procedural default. *Sawyer*, 505 U.S. at 345. These concerns would be invariably present in the context of noncapital sentencing proceedings.

If this Court were to hold that a habeas petitioner can assert actual innocence of a sentence to overcome procedural default, such claims would presumably focus on a petitioner's eligibility for his sentence, since this Court focused on eligibility factors when fashioning a standard to assess claims of innocence of death. *See id.* at 344-45. Further, the actual innocence of a sentence claim would typically be identical to the procedurally defaulted claim. Thus, the actual innocence claim would be a means of

avoiding the cause requirement for overcoming procedural default. The petitioner could obtain habeas relief based on a finding of prejudice alone. The showing of actual innocence would become virtually the equivalent of the underlying, routine habeas claim—which this Court plainly considers to be unextraordinary. This case illustrates this problem perfectly. Once it found that Haley's actual innocence of his sentence removed the barrier of procedural default, the court of appeals was compelled to conclude that he was entitled to relief. Pet. App. 17a-20a.

C. To The Extent That "Actual Innocence" Of A Sentence Can Excuse The Default Of A Sentencing Error, The Exception Should Be Limited To Capital Cases.

Should this Court decline to find that *Apprendi* and *Ring* have affected actual innocence jurisprudence, the actual innocence of a sentence exception should be limited to capital cases. Indeed, this Court has never considered the exception with respect to a noncapital sentence. And when the Court has discussed actual innocence of a sentence, it has done so with an eye toward preventing the execution of one who is "innocent of death." *Sawyer*, 505 U.S. at 341; *see also Smith*, 477 U.S. at 527.

The "actual innocence of death" exception is distinct from—and should not be extended to—an "actual innocence of a noncapital sentence" exception for two fundamental reasons. First, this Court's Eighth Amendment jurisprudence was the backdrop of its development of the framework for assessing claims of actual innocence of death. *Sawyer*, 505 U.S. at 341-44. The Court has repeatedly recognized that the gravity of capital punishment necessitates additional

procedural safeguards as compared to proceedings involving lesser penalties. For example, in *Monge v. California*, 524 U.S. 721, 732 (1998), the Court rejected a claim that *Bullington v. Missouri*, 451 U.S. 430 (1981), compelled the conclusion that double jeopardy barred a new sentencing proceeding in a "three strikes" case. The Court distinguished *Bullington* because its "capital sentencing context" was "a critical component" of the Court's reasoning in that case. *Monge*, 524 U.S. at 731; *see also Beck v. Alabama*, 447 U.S. 625 (1980) (there is a heightened concern for reliability in the guilt phase of death penalty cases). Indeed, the Court has compared death penalty proceedings to trials on guilt or innocence, *see Sattazahn*, 537 U.S. at 109—a comparison the Court, quite properly, has not made with respect to ordinary, noncapital sentencing hearings.

The "death is different" principle is firmly ingrained in the Court's jurisprudence and explains why the Court entertains claims of actual innocence of death in addition to claims of actual innocence of the offense as an excuse for procedural default. For this reason, although allowing a petitioner to present a claim of actual innocence of death may be necessary to prevent a "fundamental miscarriage of justice," the same is not true with respect to a claim of actual innocence of a penalty of a term of years.[3]

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[3] In *Glover v. United States*, 531 U.S. 198 (2001), the Court held that a counsel's error which resulted in a mere six-month increase in the defendant's sentence constituted prejudice for Sixth Amendment purposes. That holding is in no way inconsistent with the well-established "death is different" jurisprudence, but merely applies standard Sixth Amendment ineffective assistance of counsel jurisprudence. *Cf Kimmelman*

Second, one of the core concerns discussed in section I(B), *supra*, for not extending the actual innocence exception to sentencing at all also explains why, if *Apprendi* and *Ring* are irrelevant to the analysis, the exception should not be extended from capital sentencing to noncapital sentencing. Extending the exception to noncapital sentencing would convert the exception from one applicable only in the "extraordinary case," *Carrier*, 477 U.S. at 496, to a common occurrence. Petitioners would be entitled to obtain relief on defaulted claims of sentencing error simply by recasting those claims as "actual innocence" of the sentence. This would seriously erode the cause and prejudice rule.

Further, in adopting a standard of actual innocence of eligibility for death, this Court satisfied its concern that the standard be "workable" even though claims regarding capital sentences are often presented on the eve of execution. *Sawyer*, 505 U.S. at 341, 345. The court of appeals below was seemingly influenced by this concern for workability, for it drew a distinction between allowing the use of the actual innocence exception for habitual offender sentencing but not for nonhabitual offender sentencing. This distinction makes no sense. The court of appeals reasoned that the line should be drawn at habitual offender sentencing because that line would be easy to apply and extending the exception further would conflict with the notion that the exception must be applied narrowly. Pet. App. 16a (citing *United States v.*

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v. Morrison, 477 U.S. 365 (1986) (permitting habeas review of a Sixth Amendment claim premised on counsel's failure to pursue a Fourth Amendment issue even though Fourth Amendment claims are not themselves cognizable on habeas review).

Mikalajunas, 186 F.3d 490, 495 (4th Cir. 1999)). There is no relevant distinction, however, between habitual and nonhabitual offender sentencing, and this Court's actual innocence jurisprudence does not turn on the simple concept of ease of application.

The court of appeals also pointed to language in *Smith* to justify applying actual innocence beyond the capital sentencing context. Pet. App. 15a-16a. In *Smith*, Justice Stevens argued in dissent that a "fundamental fairness" inquiry should supplant the cause and prejudice requirement of *Wainwright* when a claim regarding sentencing is defaulted in a capital case. *Smith*, 477 U.S. at 545-46 (Stevens, J., dissenting). In response, the Court stated that "[w]e reject the suggestion that the principles of *Wainwright v. Sykes* apply differently *depending on the nature of the penalty* a State imposes for the violation of its criminal laws." *Smith*, 477 U.S. at 538 (emphasis added). Contrary to the lower court's reasoning, this passage from *Smith* was not intended to suggest that actual innocence of *any* available penalty can excuse default, but rather was intended to deflect the argument that the application of the cause and prejudice standard turns on the nature of the penalty imposed.

II. A Showing Of "Actual Innocence" Must Be Premised On Newly Discovered Evidence, A Standard Haley Cannot Meet.

Haley was convicted of theft of property valued less than $1500, which is ordinarily a Class A misdemeanor. But Haley's theft conviction was twice enhanced. To qualify for the second enhancement, Haley must have committed two prior felonies, and the second felony must have been committed after his

conviction for the first felony became final. *See* Tex. Penal Code §12.42(a)(2). Haley contends that he is innocent of the second enhancement because he committed attempted robbery, his second felony, on October 15, 1991, but he was not *convicted* of delivery of amphetamines, his first felony, until three days later, on October 18, 1991. Certified copies of documents from the department of corrections containing these relevant dates, found in what is commonly referred to as a "pen packet," were entered into evidence. J.A. 25, 42, 47, 76. Despite the fact that these dates show that Haley's prior convictions were not obtained in a sequential order, as required by the enhancement statute, the jury found Haley guilty of the enhancement and he was thereafter sentenced to a term of sixteen years imprisonment, instead of the maximum sentence of two years jail time that he would have received without the second enhancement. J.A. 24, 52-58, 61-62, 76.[4] Accordingly, Haley's claim of actual innocence is premised on information that was presented at trial, or of which he should have been aware at the time of trial. Settled precedent holds that a petitioner may not rely on such evidence to establish actual innocence.

Actual innocence claims must rest upon newly discovered evidence that was not presented at trial. In *Schlup*, this Court stated:

> [w]ithout any *new* evidence of innocence, even the existence of a concededly meritorious

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[4] Texas law required that the prosecution prove respondent guilty of the enhancement beyond a reasonable doubt. *See* Tex. Penal Code §12.42; *Williams v. State*, 899 S.W.2d 13 (Tex. Ct. App. 1995).

> constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim.

513 U.S. at 316 (emphasis added). A credible claim of actual innocence requires a habeas "petitioner to support his allegations of constitutional error with *new reliable evidence*—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—*that was not presented at trial.*" *Id.* at 324 (emphasis added). This standard was repeated in *Calderon v. Thompson*, 523 U.S. 538, 559 (1998). *See also Bousley v. United States*, 523 U.S. 614, 630 (1998) (Scalia, J., dissenting) (noting standard).

This Court has accepted Judge Friendly's assertion that a colorable showing of actual innocence premised on new evidence must include a consideration of all available evidence, with appropriate reliability considerations, including that which became available after the trial, that which was arguably wrongly excluded at trial, and that which was arguably wrongly included at trial. *Kuhlmann*, 477 U.S. at 454, n.17 (citing Friendly, J., 38 U. Chi. L. Rev. at 142); *Sawyer*, 505 U.S. at 339, n.5; *Schlup*, 513 U.S. at 322, n.37. There are two possible categories of "new" evidence—newly available evidence, and evidence that was available, but was wrongly excluded at trial on legal grounds. Neither Judge Friendly nor this Court suggested that a petitioner could show actual innocence solely by a review of the evidence presented at trial. Nor did Judge Friendly or this Court suggest that actual innocence could be established by evidence

that the petitioner, through due diligence, could have obtained at trial.

Moreover, allowing an actual innocence claim premised on "old" evidence would be inconsistent with the policy underpinnings of habeas jurisprudence. The States are entitled to finality in their criminal adjudications. *Carrier*, 477 U.S. at 486-87; *Thompson*, 523 U.S. at 556. Indeed, concern for finality is one of the reasons why this Court declined to find that an independent claim of actual innocence is cognizable on habeas review. *Herrera*, 506 U.S. at 404, 417. The federal courts also have a policy interest in limiting what evidence can be presented in support of habeas claims. Expanding the availability of habeas relief might require courts to "routinely . . . hold evidentiary hearings" which might "significantly increase the costs" to the system. *Carrier*, 477 U.S. at 487.

It would run contrary to these principles to allow a petitioner to rely belatedly on a factual claim that has been available to him throughout the litigation of his case.[5] In an analogous habeas context, this Court refused to allow a petitioner to pursue a successive habeas petition containing a "new" claim the factual basis of which was available to the petitioner at the time he filed his first petition. *McCleskey v. Zant*, 499 U.S. 467, 497-98 (1991); *see Sawyer*, 505 U.S. at 335, 338-40 (applying the same actual innocence standard

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[5] Here, not only was the evidence of "actual innocence" available to Haley at his trial, it was used at his trial. This use of trial evidence directly conflicts with the practice of other lower courts in addressing actual innocence claims. *See Burks v. Dubois*, 55 F.3d 712, 718 (1st Cir. 1995) (trial evidence not new under *Schlup*); *Sweger v. Chesney*, 294 F.3d 506, 523, n.18 (3rd Cir. 2002) (same).

in allowing a petitioner to proceed on a second or successive petition as in allowing a petitioner to proceed with an otherwise defaulted claim). The Court in *Zant* was not persuaded that the petitioner should have been allowed to avoid the "abuse of the writ" doctrine because the claim was arguably stronger than it had been due to "new" evidence developed by the petitioner. 499 U.S. at 498. Nor did it matter, held the Court, that the new evidence arguably strengthened the claim—the petitioner should have conducted a reasonable and diligent investigation and included all of his claims in his first petition. *Id.*

Lest it be thought that habeas petitioners will rarely present "old" evidence to support claims of actual innocence, a recent decision from the Seventh Circuit proves otherwise. In *Gomez v. Jaimet*, No. 02-4372, 2003 WL 22805702 (7th Cir. Nov. 26, 2003), the court allowed a habeas petitioner to overcome procedural default on the basis of a claim of actual innocence premised on evidence that was *available* to the petitioner at trial—indeed, one piece of evidence was the petitioner's own proposed testimony—but was simply not *used* at trial. The Seventh Circuit's decision is plainly inconsistent with the principles of comity and finality at the base of habeas review and conflicts with the underlying principle of *McCleskey*.[6]

Finally, the changes made under the Antiterrorism and Effective Death Penalty Act strongly support the

[6] The Seventh Circuit's decision is also contrary to the approach of another circuit. *See Pickens v. Lockhart*, 4 F.3d 1446, 1450 (8th Cir. 1993) (knowledge which petitioner has had for years is not "new"); *Bannister v. Delo*, 100 F.3d 610, 618, n.6 (8th Cir. 1996) (petitioner's own statement is not new evidence).

proposition that only new evidence that was not otherwise available to a petitioner exercising due diligence can support a claim of actual innocence. Under 28 U.S.C. §2244(b)(2)(B)(i), a petitioner cannot proceed on a second or successive petition unless the factual predicate underlying his claim "could not have been discovered previously through the exercise of due diligence." This provision is not directly applicable to claims of actual innocence offered as an excuse for default, but it does provide guidance. *See Thompson*, 523 U.S. at 558 (even when AEDPA does not apply, it "informs" consideration of habeas claim). As noted, prior to the enactment of this statutory provision in 1996, the Court applied the same actual innocence standard in allowing a petitioner to proceed on a second or successive petition as it did in allowing a petitioner to proceed with an otherwise defaulted claim. *See Sawyer*, 505 U.S. at 335, 338-40. While Congress chose not to address any procedural default issues in the AEDPA, there is no reason why this Court should not continue to apply similar standards to actual innocence claims related to second or successive petitions and actual innocence claims related to procedural default. Because the second or successive petition provision requires new evidence in the sense of evidence that would not have been available to a petitioner had he exercised due diligence, the actual innocence exception to default should require the same.[7]

[7] In this case, the actual innocence claim is directly linked to the underlying claim for relief. The language of the Court's decisions suggests that such a link is mandatory. *See Sawyer*, 505 U.S. at 336; *Kuhlmann*, 477 U.S. at 455. Guidance on this point is again found in 28 U.S.C. §2244(b)(2)(B). Subsection (ii)

Petitioners who seek to rely on "old" evidence are not without recourse. A petitioner who wants to rely on evidence in the trial record should either challenge the sufficiency of the evidence directly, or bring an appropriate claim of ineffective assistance of counsel. Likewise, a petitioner who failed to use information that was available to him could bring a claim against counsel. This Court has made clear that the possibility of raising an ineffective assistance of counsel claim is an additional safeguard against the occurrence of a fundamental miscarriage of justice. *Carrier*, 477 U.S. at 496. A petition for clemency is also an available option. *See Herrera*, 506 U.S. at 417 (clemency is a safety valve against miscarriage of justice).

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of the provision requires that the facts underlying the new habeas claim be sufficient to demonstrate that no reasonable factfinder would have found the petitioner guilty.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Petitioner,

v.

MICHAEL WAYNE HALEY,
Respondent.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

BRIEF FOR PROFESSORS OF LAW JAMES S. LIEBMAN, JORDAN STEIKER, JOHN C. JEFFRIES, JR., WILLIAM J. STUNTZ, ERWIN CHEMERINSKY, AND VIKRAM AMAR AS AMICI CURIAE SUPPORTING RESPONDENT

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IN THE

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DOUG DRETKE, DIRECTOR,
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Respondent.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Amici, who are law professors with particular expertise in the subject of federal collateral review, respectfully submit this brief supporting affirmance of the judgment below. As a matter of both historical practice and the balance of relevant interests, federal habeas review should be available in circumstances such as those of this case.[1]

INTEREST OF AMICI

Amici are law professors who teach and write from a range of perspectives on topics that include the history, role, and doctrine of federal collateral review. They accordingly have a professional interest in the proper application and development of the law in this area, and seek to provide the

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amici and their counsel made any monetary contribution toward the preparation or submission of this brief. Letters indicating the parties' consent to the filing of this brief have been submitted to the Clerk.

Court with a discussion of historical and modern habeas jurisprudence as they bear on the specific question presented in this case.

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SUMMARY OF ARGUMENT

From the time of the founding, courts in this country have heard habeas petitions from individuals who claim that they have been detained without proper legal authority. In broad outline, the 19th century and much of the 20th saw a gradual expansion in the circumstances under which federal habeas relief was available, particularly to state prisoners. While this trend increased protection for individual rights, it also put increased pressure on countervailing interests in finality, comity, and the conservation of judicial resources. In response, this Court over time imposed prudential limitations on the availability of federal collateral review, particularly in cases involving successive petitions or procedurally

defaulted claims. At the same time, in the absence of a governing statutory rule, the Court has always adhered to the principle that habeas is an equitable remedy, and that in appropriate cases, normal procedural bars "must yield to the imperative of correcting a fundamentally unjust incarceration." *Engle* v. *Isaac*, 456 U.S. 107, 135 (1981).

To give practical content to this "miscarriage of justice" principle, the Court has looked both to the historic role of the writ, and to a balancing of the relevant interests as they apply to different categories of cases. On any view of the relevant history, this Court has long considered it a core function of the Great Writ to provide relief when the habeas petitioner is held under a sentence that the sentencing court was not legally authorized to impose. State courts, too, traditionally stood ready to correct such "illegal" (as opposed to merely "irregular") sentences. In other words, it has long been understood that it is a miscarriage of justice to punish an individual more harshly than the law allows, just as it would be to impose any punishment on an individual whose conduct was legally blameless. Fundamental fairness requires that no person suffer a greater punishment than that for which his conduct made him legally eligible.

As to the balancing of interests, the Court has looked to plausible claims of factual innocence as a touchstone in determining when the need to prevent a miscarriage of justice must take precedence. The Court has applied that principle where the habeas petitioner can show "actual innocence" of the offense of conviction, but also where the petitioner is "actually innocent" of some fact or circumstance that was legally necessary to authorize the penalty imposed. Here, the State concedes that the respondent did not in fact qualify as a habitual felony offender under Texas law. The state court that sentenced him therefore had no legal authority to order him imprisoned for longer than two years. Yet, the State seeks to keep him imprisoned for more than 16 years, solely because of an undisputed factual error, and a procedural default in bringing that error to the attention of the courts. In a case such as this one, the individual and societal interests in providing an effective remedy for lawless incar-

ceration are very strong, while the interests in comity, finality, and judicial efficiency are very weak. And in this regard, there is no persuasive reason to distinguish non-capital from capital sentences, or recidivism factors from other factors that increase the maximum sentence that is legally authorized in a given case. Accordingly, both history and reason dictate that the federal courts should be available to hear and determine respondent's habeas claim.

ARGUMENT

Following a jury trial in a Texas court, respondent Haley was convicted of stealing property worth less than $1,500, after having been convicted twice before of other thefts. J.A. 8-9, 61-67. Under Texas law, the third theft offense ordinarily would have carried a maximum sentence of two years' imprisonment. J.A. 54. Under the State's habitual offender statute, however, the court was required to impose a sentence of from two to 20 years' imprisonment if the State could prove, beyond a reasonable doubt, "that the defendant ha[d] previously been finally convicted of two felonies, and the second previous felony conviction [was] for an offense that occurred subsequent to the first previous conviction having become final." Tex. Pen. Code Ann. § 12.42(a)(2) (West 2003); *see Williams* v. *State*, 899 S.W.2d 13, 14 (Tex. Ct. App. 1995). The State's indictment alleged, and the jury found, that respondent had previously been finally convicted of a drug offense and a robbery, and that the first offense "became final prior to the commission" of the robbery. J.A. 9, 61-67. The court sentenced respondent to 16 years and six months' imprisonment J.A. 61-67.

The State now concedes that both its indictment and the jury's finding were factually incorrect. As the records of the prior convictions presented by the State at sentencing clearly showed, respondent's second prior felony was committed before, not after, his conviction for the first became final. Pet. Br. 4; J.A. 40-51. In these federal habeas proceedings, however, the State has argued that because respondent did not properly raise this issue in the trial court or on direct appeal, the federal courts are powerless to hear respondent's

claim that the State has committed him to prison for fourteen and a half years more than the State's own law authorizes as punishment for his offense. Pet. Br. 5. The district court and the Fifth Circuit held that any procedural default should be excused, on the ground that respondent is "actually innocent" of the habitual-offender finding under which he was sentenced. Pet. App. 20a. In the court of appeals' view, requiring respondent to "continue serving a sentence as an habitual offender" would be "a classic example of a 'fundamental miscarriage of justice'" of the sort that a federal habeas court is always able to correct. *Id.* As presented by the State's petition (Pet. Br. i), the question in this case is whether the "actual innocence" or "miscarriage of justice" principle should be available in a case, such as this one, that involves any sentence short of death.

THE MISCARRIAGE-OF-JUSTICE PRINCIPLE THAT PERMITS FEDERAL HABEAS COURTS TO HEAR PROCEDURALLY BARRED CLAIMS IN UNUSUAL CASES SHOULD APPLY WHERE A HABEAS PETITIONER CAN SHOW THAT EARLIER PROCEEDINGS HAVE RESULTED IN THE IMPOSITION OF A DEMONSTRABLY UNLAWFUL SENTENCE

Chief Justice Marshall identified the "great object" of the writ of habeas corpus as "the liberation of those who may be imprisoned without sufficient cause." *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830). From the time of the founding (and, indeed, before), courts in this country have heard petitions from those who claim that they have been detained without proper legal authority. At the same time, this Court "has always recognized . . . that the Great Writ entails significant costs." *Engle*, 456 U.S. at 126. Over time, Congress and the Court have crafted procedural limitations on federal collateral review, balancing the demand for individual justice against countervailing interests in finality, comity, and the husbanding of scarce judicial resources. In the last analysis, however, the Court has always recognized that systemic concerns, however important, must sometimes "yield to the imperative of correcting a fundamentally unjust

incarceration." *Murray* v. *Carrier*, 477 U.S. 478, 495 (1986) (internal quotation marks and citation omitted).

The difficulty lies in giving practical content to this "miscarriage of justice" principle. In recent years, the Court has approached that task both by looking to historical practice, and by analyzing whether lifting a procedural bar in particular categories of cases would strike an appropriate balance among the relevant interests. The Court's cases have concluded that, at a minimum, a miscarriage of justice has occurred when a habeas petitioner has been subjected to a punishment for which he was not, in fact, legally eligible—either because he was actually innocent of the crime of conviction, or because he was actually "innocent" of some necessary factual predicate for the sentence he received. Although the Court has not previously had occasion to apply the miscarriage-of-justice principle to a non-capital sentence, neither the history of the writ nor the reasoning of this Court's previous cases supports confining the principle's operation to capital cases. In the unusual situation presented by this case, in which respondent is concededly serving a sentence that the State had no legal authority to impose on him, both history and reason suggest that the federal courts should hear respondent's claim.

A. The Miscarriage-Of-Justice Principle Developed As A Means Of Balancing The Demand For Individual Justice Against Countervailing Interests In Finality, Comity, And The Prudent Administration Of Judicial Resources

The Judiciary Act of 1789 gave federal courts the authority to issue writs of habeas corpus on behalf of persons in federal custody. *See* Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81-82 (authorizing issuance of the writ to inquire into the "cause of commitment" of any person "in custody, under or by colour of the authority of the United States").[2] In

[2] While Congress has always provided statutory authority for the issuance of the writ, the scope of the remedy has largely been defined by the courts. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807) (Marshall, C.J.); *Schlup* v. *Delo*, 513 U.S. 298, 319 n.35 (1995) ("This Court has repeatedly noted the interplay between statutory language and judicially managed equitable considerations in the development of habeas corpus jurisprudence.").

1867, Congress further authorized the federal courts to grant the writ to persons held by a State "in violation of the Constitution, or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. As to both federal and state prisoners, the substantive and procedural law concerning federal habeas "has not been without historical uncertainties and changes in direction on the part of the Court." *Wainwright* v. *Sykes*, 433 U.S. 72, 81 (1977). In broad outline, however, the 19th century and much of the 20th saw a gradual expansion of the circumstances under which the writ was available, particularly to persons in state custody. *See, e.g.*, *id.* at 79; *Kuhlmann* v. *Wilson*, 477 U.S. 436, 446 (1986) (plurality opinion); R. Hertz & J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 2.4d, at 60-66 (4th ed. 2001) ("Hertz & Liebman").

This expansion strengthened the role of federal habeas in protecting individual rights. At the same time, it produced some increase in the workload of the federal courts. It also increased the possibility that the availability of collateral review would "undermine[] the usual principles of finality of litigation." *Engle*, 456 U.S. at 127-128. In addition, as more cases were brought by state prisoners, this Court grew concerned about issues of comity. Federal review could threaten to "frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor [federal] rights." *Id.* And that risk could be viewed as particularly serious when some procedural default "has barred a prisoner from obtaining adjudication of his [federal] claim in the state courts," because such a default deprives those courts of an opportunity "to mend their own fences and avoid federal intrusion." *Id.* at 128-129.

In 1953, this Court held that a procedural default that precluded consideration of a federal claim by the state courts barred federal habeas review of that claim. *See Brown* v. *Allen*, 344 U.S. 443, 486-487 (1953). Ten years later, the

Court overruled that aspect of *Brown* in *Fay* v. *Noia*, 372 U.S. 391, 399 (1963). *Fay* made clear that state procedural default did not constitute a jurisdictional bar to consideration of a claim on federal habeas, and suggested that defaulted claims were reviewable as long as the petitioner had not "deliberately bypassed" review by the state courts. *Id.* at 438; *see also Sykes*, 433 U.S. at 82-83 (discussing *Brown* and *Fay*). Finally, in *Wainwright* v. *Sykes*, the Court settled on an intermediate position, reaffirming federal courts' power to consider procedurally defaulted claims, but holding that such claims would generally be reviewed only if the petitioner could establish both cause for the default and some real prejudice stemming from the asserted federal error. *See Sykes*, 433 U.S. at 87; *Coleman* v. *Thompson*, 501 U.S. 722, 750 (1991); *Francis* v. *Henderson*, 425 U.S. 536, 541 (1976); *see also United States* v. *Massaro*, 123 S. Ct. 1690, 1693 (2003) ("The procedural default rule is neither a statutory nor a constitutional requirement . . . .").

In the years after *Sykes*, the Court extended the cause-and-prejudice standard to the context of repetitive habeas petitions raising claims that had already been considered once on federal habeas ("successive" claims) or that could have been, but were not, raised in an earlier petition (potentially "abusive" claims). *See, e.g., Schlup*, 513 U.S. at 318-319 (discussing cases); *McCleskey* v. *Zant*, 499 U.S. 467, 493 (1991) ("abusive" claims). The Court also applied the cause-and-prejudice standard to petitions seeking collateral review of federal, as well as state, proceedings. *See United States* v. *Frady*, 456 U.S. 152, 167-168 (1982) (procedurally defaulted claims). Cause-and-prejudice thus became a generally applicable test to limit the reviewability of defaulted, successive, or potentially abusive claims, to the extent that Congress has not specified some other governing rule.[3]

[3] In 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") altered the previously applicable standards to bar reconsideration of any claim by a state prisoner that was already presented in an earlier federal habeas petition, *see* 28 U.S.C. § 2244(b)(1), and to place significant limits on consideration of such claims raised for the first time in a second or successive petition, *see id.* § 2244(b)(2). AEDPA also limits successive motions by federal prisoners seeking collateral review. *See id.* § 2255. With the exception of a special subset of capital cases not relevant here, AEDPA does not alter the standards that apply to determine whether a claim is barred solely because of a procedural default. *See* Hertz & Liebman § 26.1, at 1135.

In developing and applying these procedural limitations, however, "the Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy," and has "consistently relied on the equitable nature of habeas corpus to preclude application of strict rules" of preclusion. *Schlup*, 513 U.S. at 319. Accordingly, the Court has always insisted on leaving room for the consideration of certain claims, by "consistently reaffirm[ing] the existence and importance of [an] exception" from the cause-and-prejudice standard where habeas review is necessary to prevent "fundamental miscarriages of justice." *Id.* at 321. In such cases, the Court has recognized that "the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.'" *Carrier*, 477 U.S. at 496 (addressing a procedurally defaulted claim) (quoting *Engle*, 456 U.S. at 135); *see also, e.g., Sawyer* v. *Whitley*, 505 U.S. 333, 339-340 (1992) (discussing cases); *Smith* v. *Murray*, 477 U.S. 527, 537 (1986) (noting that the miscarriage-of-justice principle could apply to excuse a procedural default where a death sentence was imposed in error); *Kuhlmann*, 477 U.S. at 452 (plurality opinion) (addressing successive claims, and noting that there are "circumstances under which the interests of the prisoner in relitigating constitutional claims . . . outweigh the countervailing interests served by according finality to the prior judgment"); *Bousley* v. *United States*, 523 U.S. 614 (1998) (recognizing the miscarriage-of-justice exception in the context of a § 2255 petition brought by a federal prisoner). By preserving such an exception, but carefully limiting its scope, the Court has sought to "accommodate[] both the systemic interests in finality, comity, and conservation of judicial resources, and the overriding individual interest in doing

justice in the 'extraordinary case.'" *Schlup*, 513 U.S. at 322 (quoting *Carrier*, 477 U.S. at 496).[4]

[4] The State argues that respondent is asserting a "freestanding" claim of actual innocence. Pet. Br. 35. This Court has reserved decision as to whether, in an appropriate case, "a truly persuasive demonstration of 'actual innocence' made after trial" could itself justify habeas relief. *Herrera* v. *Collins*, 506 U.S. 390, 417 (1993). In this case, however, respondent has a cognizable habeas claim even if "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 404. Respondent can demonstrate both (i) that he does not, in fact, meet the definition of a "habitual offender" under Texas law, and (ii) that given the evidence submitted at trial, no rational fact-finder could have found that he did. The first is a claim of "actual innocence," while the second claims that it violates due process for the State to imprison respondent for fourteen and a half years more than the otherwise applicable statutory maximum sentence, on the basis of a factual finding concerning his prior convictions that the trial record simply cannot support (and, indeed, refutes). *See Jackson* v. *Virginia*, 443 U.S. 307, 318-319 (1979) (due process violation has occurred if, "after viewing the evidence in the light most favorable to the prosecution, [no] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"); *Thompson* v. *Louisville*, 362 U.S. 199, 206 (1960) ("Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt.").

There is no merit to the State's contention (Pet. Br. 36-37) that actual innocence can be the "gateway" to habeas consideration only for some constitutional claim wholly unrelated to innocence. The very point of the "actual innocence" standard is that equity requires the relaxation of procedural default rules where a habeas petitioner can supply strong evidence of factual innocence. It would be quite inequitable to hold that such a showing cannot provide the justification necessary to hear an otherwise defaulted claim that the underlying conviction or sentencing determination was procured in the absence of sufficient, or indeed any, record evidence.

B. Applying The Miscarriage-of-Justice Principle To Permit Review Of Demonstrably Unlawful Non-Capital Sentences Is Consistent With The Historical Uses Of Federal Habeas

In seeking to frame the "miscarriage of justice" principle in a way that provides an appropriate equitable safety-valve in exceptional cases, the Court has looked to the historic purpose and uses of the writ, and to its own balancing of the relevant societal and individual interests. *See Kuhlmann*, 477 U.S. at 447-448, 454 (plurality opinion) (undertaking an "ends of justice" inquiry "[i]n light of the historic purpose of habeas corpus" and the interests implicated by allowing review); *Engle*, 456 U.S. at 126-129 (evaluating standards for the excuse of procedural default with reference to the historical role of the writ and the costs of granting review); *Sykes*, 433 U.S. at 77-78 (noting the need to evaluate the historical role of the writ in interpreting the meaning of "unlawful detention"); *Carrier*, 477 U.S. at 495-496 (evaluating scope of the miscarriage exception in light of balance of competing interests); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 253-258 (1973) (Powell, J., concurring) (discussing importance of evaluating historical role of the writ in assessing the meaning of "unjust incarceration"). We address first what history discloses concerning the use of the writ to correct the imposition of punishment in excess of that authorized by law.

The fear that an innocent person may be deprived of his liberty has long been recognized as one of the fundamental concerns underlying the writ of habeas corpus. *See* Hertz & Liebman § 2.5, at 89. Accordingly, one of the principal functions of habeas corpus has always been to assure fair procedures that reduce the risk that any error will "undermine[] the accuracy of the guilt or sentencing determination." *Smith*, 477 U.S. at 539; *see also Bousley*, 523 U.S. at 620; Henry J. Friendly, *Is Innocence Irrelevant?: Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970) (arguing that federal habeas review should be available where a constitutional claim is supplemented with "a colorable showing of innocence"). And in recent years, in cases

where the Court has "narrowed the reach of the writ, it has repeatedly emphasized that the availability of habeas relief should depend in large measure on whether the petitioner is factually innocent." Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. Rev. 303, 304 (1993); *see also McCleskey*, 499 U.S. at 495; *Carrier*, 477 U.S. at 496; *Stone* v. *Powell*, 428 U.S. 465, 491 n.31 (1976). A mechanism for permitting review where factual innocence is in question "serves as 'an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty.'" *McCleskey*, 499 U.S. at 495 (quoting *Stone*, 428 U.S. at 492-493 n.31).

In the sentencing context, factual innocence means, at a minimum, the imposition of a sentence harsher than that authorized by law—or the absence of some factual predicate legally essential to justify the punishment imposed. History demonstrates that relief from such unlawful sentences has long been a core function of the writ.

1. Modern scholarship regarding the historical scope of the writ has been dominated by two competing views: one relatively expansive, the other relatively narrow. *See* Hertz & Liebman § 2.4c. The expansive view, reflected in Justice Brennan's opinion for the Court in *Fay* v. *Noia*, holds that at common law the writ was "available to remedy any kind of governmental restraint contrary to fundamental law." 372 U.S. at 405; *see also* Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 Harv. C.R.-C.L. L. Rev. 579 (1982). On that view, the core uses of the writ always extended to remedying a sentence imposed without, or in excess of, lawful authority. *See* Hertz & Liebman § 2.4c, at 36-37 (describing expansive view).

The narrower view of the historical scope of habeas is exemplified by a well-known article by Professor Bator. *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963). On this view, at its historical core "the writ originally performed only the narrow function of testing either the jurisdiction of the sentencing court or the legality of Executive detention." *Schlup*, 513 U.S. at 317; *see also* Bator,

76 Harv. L. Rev. at 471-474; Hertz & Liebman § 2.4c, at 34-36. As Bator recognized, however, the nineteenth-century understanding of "jurisdiction" encompassed not only what we would think of today as formal jurisdiction over person and subject matter, but also broader notions of a court acting within the lawful scope of its authority. Bator, 76 Harv. L. Rev. at 471; *see also Developments in the Law: Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1047 (1970).

This view of the "jurisdiction" limitation is consistent with a review of this Court's early cases, which manifest concern not only with formal jurisdiction, but also with the "equally critical" question whether the detaining court acted "unlawfully," or without legal authority. Hertz & Liebman, § 2.4d, at 44; *see, e.g.*, *Ex parte Kearney*, 20 U.S. (7 Wheat.) 38, 42 (1822) ("[T]here is no question here, but that this commitment was made by a Court of competent jurisdiction, *and* in the exercise of an unquestionable authority.") (emphasis added). Thus, in the period between 1789 and 1874 (during which federal habeas was governed by the 1789 Judiciary Act), the Court granted both review and relief in cases in which the detaining court had personal and subject-matter jurisdiction, but had acted in excess of its legal authority. *See* Hertz & Liebman § 2.4d, at 43-44 & nn.89, 90 (citing cases); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 166 (1874) (inquiring "whether that [detaining] court has exceeded its authority").[5]

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[5] During this period, the Court reviewed nine habeas cases brought by federal prisoners. In four of those cases it was clear that the detaining authority had formal jurisdiction to order the detention—and yet in three of those, the Court granted relief. *See Lange*, 85 U.S. (18 Wall.) 163 (granting relief where committing court exceeded its legal authority by imposing a sentence of both imprisonment and a fine, when the governing statute authorized only one or the other); *United States* v. *Hamilton*, 3 U.S. (3 Dall.) 17 (1795) (granting relief where arrest on charge of treason was not supported by probable cause); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) (granting relief because lower court issued arrest warrant without probable cause); *Ex parte Milburn*, 34 U.S. (9 Pet.) 704 (1835) (granting review but denying relief on a double jeopardy claim). The remaining five cases were *Ex parte Burford*, 7 U.S. (3 Cranch) 448 (1806) (granting relief from illegal commitment where petitioner was

Moreover, as Professor Bator recognized, the Court expressly held that a court "exceeded its authority" for these purposes, thus rendering its judgment amenable to habeas review, when it imposed a criminal sentence greater than that authorized by the applicable statute. Bator, 76 Harv. L. Rev. at 472 ("[R]eexamination of the validity of the sentence was . . . traditionally available on habeas corpus."); *see also* Friendly, 38 U. Chi. L. Rev. at 151 ("[T]he original sphere for collateral attack on a conviction was where the tribunal lacked jurisdiction either in the usual sense or because the statute under which the defendant had been prosecuted was unconstitutional *or because the sentence was one the court could not lawfully impose.*") (emphasis added).[6]

In *Lange*, the petitioner had been convicted of misappropriating mail bags to his own use. The relevant statute authorized a sentence of "imprisonment for not more than one year *or* a fine of not less than ten dollars nor more than two hundred dollars." 85 U.S. (18 Wall.) at 164. The judge, however, sentenced petitioner to "one year's imprisonment,

summarily incarcerated without a warrant stating an offense, and without trial or conviction); *Ex parte Watkins II*, 32 U.S. (7 Pet.) 568 (1833) (granting relief where petitioner was sentenced to imprisonment and a fine but was held after expiration of the prison term because he had not paid the fine, on the ground that continued detention was unlawful absent an additional court order authorizing further custody); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (granting relief where civilian's conviction by a military tribunal violated his constitutional right to trial by jury before a life-tenured judge); *In re Kaine*, 55 U.S. (14 How.) 103 (1853) (granting review but denying relief where petitioner was held on lawful warrant for extradition); and *Ex parte Wells*, 59 U.S. (18 How.) 307 (1856) (granting review but denying relief after upholding legality of presidential pardon authorizing life imprisonment after commutation of death sentence).

[6] Bator also distinguished claims challenging pretrial detention, for which review was "traditionally available on habeas," from claims that a petitioner sought to raise on habeas only *after* he had already been convicted by a court of competent jurisdiction. Bator, 76 Harv. L. Rev. at 466, 471-472 (comparing cases); *see also* Hertz & Liebman § 2.4c, at 35. He suggested that historically the validity of a sentence might have been viewed in much the same light as a pretrial judicial decision, and thus amenable to reexamination on habeas even where the sentencing court had jurisdiction to enter the judgment of conviction. Bator, 76 Harv. L. Rev. at 472.

and to pay two hundred dollars fine." *Id.* After the fine was paid and Lange had served five days of his prison sentence, he sought relief. The sentencing judge then vacated the original sentence and resentenced Lange to one year in prison. Exercising its habeas jurisdiction under the 1789 Judiciary Act, this Court granted relief. The Court concluded that the sentencing judge had acted unlawfully, because after the fine was paid, Lange had "fully suffered one of the alternative punishments to which alone the law subjected him," and at that point "the authority of the court to punish [him] further was gone." *Id.* at 176. It emphasized that although the lower court had jurisdiction over both the petitioner and the offense, "[i]t by no means follow[ed]" that the judgment was immune from habeas review, where the sentence imposed was "in excess of the authority of the court." *Id.* at 176-177. In the Court's striking example, if a court of proper jurisdiction were to preside over the conviction of a defendant for a misdemeanor punishable by a fine, but then sentence the defendant to be hanged, a writ could issue to prevent that result, because the court's judgment would be "void." *Id.*

Lange may be viewed as merely an application of settled principles, or as part of a long trend of judicial decisions "gradually . . . expanding the availability of habeas relief." *Sykes*, 433 U.S. at 78. Either way, it is clear that even on the narrower view of history espoused by Professor Bator, for well over a hundred years this Court has considered it a core function of the Great Writ to provide appropriate relief when "the sentence of the . . . Court under which the petitioner is held a prisoner" exceeds the bounds authorized by law, and therefore "was pronounced without authority." *Lange*, 85 U.S. at 178.[7] In other words, it has long been con-

[7] *See also, e.g., Ex parte Wilson*, 114 U.S. 417, 421 (1885) (habeas relief available where "the sentence exceeds the jurisdiction of th[e] court, or there is no authority to hold [a prisoner] under the sentence"); *Ex parte Neilsen*, 131 U.S. 176, 190-191 (1889) (following *Lange* and granting relief where lower court was "without authority" to impose consecutive sentences for what was found to be one charge); *Ex parte Snow*, 120 U.S. 274, 284-285 (1887) (same); *In re Mills*, 135 U.S. 263, 269 (1890) (granting relief

sidered that allowing such an unlawful sentence to stand would result in a fundamental miscarriage of justice.

2. State courts in the nineteenth century also appear to have understood habeas to extend to cases in which a court sentenced the petitioner to greater punishment than was authorized by law. In other words, to the extent that the availability of relief depended on a lack of "jurisdiction" in the committing court, whether that court had the "power to render the particular sentence" was considered an "element[] of [its] jurisdiction." William S. Church, *A Treatise on the Writ of Habeas Corpus* § 356 (2d ed. 1893) (citing cases) ("Church"). The standard view in this regard was that "irregularities" in the proceedings, such as failure to adhere to prescribed rules of procedure, or failure to perform properly some duty that was necessary to the "orderly conduct[] of the suit," were correctable only on appeal or writ of error. In contrast, "illegalities," such as a lack of formal jurisdiction or other lack of legal authority to detain, were cognizable on habeas corpus. *See* Church §§ 348, 353a, 363, 372-373 (citing cases); *see also Ex parte Brown*, 63 Ala. 187 (1879) ("*Illegality*, not *irregularity*, must infect the proceedings, to authorize a discharge on *habeas corpus*"; sentence was not in excess of that authorized by law where the petitioner was sentenced for the offense of which he was convicted, although the judgment erroneously recited a lesser offense).

A sentence was "illegal" in this sense if it entailed greater punishment than the sentencing court was legally authorized to impose. *See* Church § 373 (an "excessive sentence is one by which a greater punishment is inflicted than that allowed by law"); Rollin C. Hurd, *A Treatise on the Writ of Habeas Corpus* 327-328 (2d ed. 1876) (it would be irregular to sentence a defendant in contravention of rules of pro-

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where court did not have statutory power to sentence petitioner to hard labor; petitioner was entitled to relief if "apart from any question as to whether the court below . . . [had] jurisdiction . . . , his detention . . . is in violation of the laws of the United States"); Hertz & Liebman § 2.4d, at 50; Bator, 76 Harv. L. Rev. at 467-468.

cedure; "it would be illegal to sentence him to imprisonment for a crime which was punishable by a pecuniary fine only"). In most courts, habeas relief would simply void the unauthorized portion of the sentence.[8] In some cases, however, habeas courts held that an excessive sentence was entirely void.[9] In any event, under state as well as federal practice, the purpose and operation of the Great Writ have long been understood to extend to providing relief to those held in custody under a sentence that the rendering court lacked the legal authority to impose.

As noted above, the long recognition that habeas relief was warranted for a sentence imposed in excess of the court's authority reflects a corresponding recognition that it is as intolerable to punish given conduct more harshly than the law allows, as it is to punish at all an individual whose conduct was legally blameless. In either case, denying relief causes "an innocent man to suffer an unconstitutional loss of liberty." *Stone*, 428 U.S. at 491 n.31. The writ has for centuries been a "bulwark against convictions that violate fundamental fairness." *Engle*, 456 U.S. at 126 (internal quotation marks and citation omitted). And fundamental fairness requires that no person suffer a greater punishment than that for which he is legally eligible.

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[8] *See, e.g., Ex parte Bulger*, 60 Cal. 438 (1882) (where statute provided for imprisonment not to exceed six months, prisoner sentenced to three years would be released on habeas when six months had expired); *Ex parte Mooney*, 26 W. Va. 36 (1885) (where statute provided for fine or imprisonment and court imposed both, sentence was void as to the excess; although court had jurisdiction over subject and person, the excessive sentence was not authorized by law); Church §§ 353a, 373 (citing additional cases).

[9] *See, e.g., Ex parte Page*, 49 Mo. 291 (1872) (discharging prisoner sentenced to ten years' imprisonment, where statute authorized only up to seven years; detaining court "exceeded its jurisdiction" by imposing a sentence that exceeded lawful authority) (superseded by statute providing authority to void only excess portion of a sentence); Church §§ 353a, 373 (citing cases). In some cases, no relief was granted. *See Ex parte Van Hagan*, 25 Ohio St. 426 (1874) (denying relief where punishment exceeded that authorized by current law, which repealed by implication an earlier law that provided for greater punishment).

C. Applying The Miscarriage-Of-Justice Principle In These Circumstances Strikes An Appropriate Equitable Balance By Correcting Manifest Injustice In An Unusual Case, Without Substantially Burdening Comity, Finality, Or Judicial Resources

1. In defining the scope of the miscarriage-of-justice exception to procedural bar rules, the Court's modern habeas cases have balanced the systemic interests in comity, finality, and conservation of judicial resources against the need to ensure that habeas relief remains available to prevent manifest injustice. *See, e.g., Engle*, 456 U.S. at 135. The Court has thereby sought to "ensure that the fundamental miscarriage of justice exception [will] remain 'rare' and [will] only be applied in the 'extraordinary case,' while at the same time ensuring that the exception [will] extend relief to those who are truly deserving." *Schlup*, 513 U.S. at 321.

In *Carrier*, the Court observed that a prisoner who has suffered a miscarriage of justice will not always be able to satisfy the cause-and-prejudice test. *Carrier*, 477 U.S. at 496. It concluded that, to satisfy "fundamental fairness," a procedural default should be excused, even without a showing of cause, if the petitioner can show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent" of the charged offense. *Id.*; *accord Schlup*, 513 U.S. at 321.

Kuhlmann, decided the same day as *Carrier*, elaborated on this "innocence" analysis. A plurality of the Court reasoned that in order to identify those cases in which federal courts should exercise their discretion to hear successive petitions, it was necessary to balance concerns of finality and comity against "the historic function of habeas corpus to provide relief from unjust incarceration." *Kuhlmann*, 477 U.S. at 451-452 (plurality opinion). The plurality observed that respecting the finality of state judgments furthers the goals of deterrence, punishment, and rehabilitation of "guilty defendants." *Id.* at 452-453. It concluded, however, that under appropriate circumstances those interests must yield to the habeas petitioner's "powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated." *Id.* at 452.

The Court has recognized that the same balancing of interests warrants application of the miscarriage-of-justice exception not only to petitioners who are "actually innocent" of the crime of conviction, but also to petitioners who are "actually innocent" of the penalty imposed. In *Smith* v. *Murray*, the Court indicated that under certain circumstances it would apply the exception in the context of a petition alleging error in the imposition of a death sentence. 477 U.S. at 537. The Court elaborated on that analysis in *Sawyer* v. *Whitley*, concluding that a petitioner could logically be deemed "'actually innocent' of the death penalty" when he could "show by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found the petitioner *eligible* for the death penalty under the applicable state law." 505 U.S. at 336 (emphasis added); *see also id.* at 344-345.

Together, these decisions make clear that "actual innocence," as this Court has used the term in applying the miscarriage-of-justice standard, is not limited to cases in which the petitioner did not commit the crime of which he was convicted. *See id.* at 343 (noting that "actual innocence" has "a more expansive meaning . . . than simply innocence of the capital offense itself"). Rather, the "actual innocence" standard defines a group of cases in which punishment was imposed without legal authority, including cases in which there is a failure of proof on some factual predicate that is legally essential to justify imposition of that punishment. Under the reasoning of *Smith* and *Sawyer*, the miscarriage-of-justice exception thus applies to cases challenging a sentence when the petitioner can show "actual innocence" of some conduct or circumstance that was necessary to render the petitioner legally eligible for the sentence that was imposed.

As *Sawyer* explains, focusing the inquiry on legal eligibility for a particular sentence ensures that plausible invocations of the miscarriage exception will remain rare, and that

the inquiry demanded of habeas courts will be based on "relatively objective standards." *Id.* at 341, 344-345.[10] As compared to a standard that focuses only on guilt or innocence of the underlying crime, the eligibility test "broadens the extent of the inquiry but not the type of inquiry," because in both cases the habeas petitioner is asserting the factual absence of some essential element used to define "the class of defendants [legally] eligible" for a particular penalty. *Id.* at 344-345. Moreover, "proof or disproof" of such eligibility factors, "like proof of the elements of the crime, is confined by the statutory definitions [of penalty-eligibility factors] to a relatively obvious class of relevant evidence." *Id.* at 345. Accordingly, the *Sawyer* Court concluded that consideration of a habeas petitioner's legal eligibility for the death penalty under state law neither threatened significant harm to comity or finality, nor imposed an onerous burden on federal habeas courts. *See id.* at 345-346. At the same time, permitting application of the miscarriage-of-justice principle served the compelling interest in basic justice that habeas has always been meant to protect, by ensuring that a procedural default would not result in the execution of an individual when the applicable law did not, in fact, authorize the imposition of that sentence. *Cf. Smith*, 477 U.S. at 538-539 (noting that a claim implicates fundamental fairness when it involves "the accuracy of the guilt or sentencing determination").

2. Essentially the same balance of interests applies where, as in this case, a petitioner can demonstrate that he is not statutorily eligible for the non-capital sentence under

[10] *Sawyer* rejected a standard under which the habeas court would have been required to consider whether the jury might have reached a different conclusion about the appropriateness of capital punishment if it had been presented with additional mitigating evidence. 505 U.S. at 345-346. The Court reasoned that any such reweighing of discretionary sentencing considerations, as opposed to eligibility factors, would unacceptably "broaden the inquiry" for the habeas court. *Id.* at 345. This functional distinction between errors that affect legal eligibility for a given sentence, on the one hand, and errors that affect only the propriety of a given sentence within a legally authorized range, on the other, is applicable to non-capital as well as to capital sentencing.

which he is confined. Those circumstances strongly implicate the individual and societal interests in providing an effective remedy for a fundamentally lawless, and thus unjust, incarceration. Here, for example, the State concedes (Pet. Br. 4) that respondent did not in fact qualify as a habitual felony offender under Texas law. In other words, he was "actually innocent" of the specific conduct (or circumstance) that was the legal predicate for his sentence. The state court that sentenced him therefore had no legal authority to order him imprisoned for longer than two years. He has already served that term and more. Yet the State seeks to keep him imprisoned for more than fourteen years longer than was ever authorized by state law—solely because of an undisputed factual error, and a procedural default in bringing that error to the attention of the courts.

At the same time, the systemic interests that generally justify procedural bars are at their weakest in cases like this one.

a. Comity concerns arise when "[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Engle*, 456 U.S. at 128. But any true affront to comity is difficult to discern here. This is not a case where the state trial court was denied a contemporaneous opportunity to correct some mere procedural defect, and should not now be forced to face the prospect of having to retry a defendant who was already once properly convicted on the merits. *Cf. id.* In fact, no substantial additional process is required here. Ascertaining the relevant dates of respondent's two convictions requires no evidentiary hearing or contested sentencing proceeding. Nor have the state appellate courts been denied the opportunity to pass, in the first instance, on some complex or novel question of federal law.

Nor is there is any threat that hearing a claim involving sentence *eligibility* could "frustrat[e] the States' sovereign power to punish offenders." *Id.* The State can articulate no legitimate interest in imposing, or persisting in the enforcement of, a sentence that is concededly invalid *under state*

law. To the contrary, one would think that a State's interest lies in ensuring that defendants in its courts are sentenced in *accordance* with state law. Indeed, the present attempt by state prosecutors to characterize the state statutory requirement of sequential convictions as a "legal technicality" (Pet. Br. 23) itself "frustrates the State's sovereign power to punish offenders," by defying the State legislature's decision to proscribe and punish specific behavior. It is the legislature that "has primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme," and it is those choices that are entitled to "proper deference." *Ewing* v. *California*, 123 S. Ct. 1179, 1189, 1190 (2003) (plurality opinion).

Finally, the relief accorded in a case such as this will never be to "nullifi[y]" state proceedings. Pet. Br. 21. The appropriate relief in an unlawful sentence case need be nothing other than an order assuring that the defendant will be properly resentenced. The only state process that such an order could "nullifi[y]" would be the continuing imposition of some degree or form of punishment that was never authorized by state law.

b. Finality concerns arise when the prospect of readily available collateral review frustrates the State's interests in punishment of crime, as well as in deterrence and rehabilitation of those who commit crimes. *Kuhlmann*, 477 U.S. at 452-453 (plurality opinion); *Engle*, 456 U.S. at 127 n.32. Yet the systemic interest in finality, which is usually so powerful, has little force in the context of a demonstrably unlawful sentence. As *Kuhlmann* suggested, finality is important because it ensures that the State can successfully punish and rehabilitate "guilty defendants," and deter potential criminals. 477 U.S. at 452-453 (plurality opinion). None of those goals is undermined in the least by a rule that permits consideration of a claim brought by a petitioner who can demonstrate that on the facts of his case, the law never authorized the punishment imposed on him. In this case, for example, it seems little more than a cruel joke to suggest that federal habeas review of a sentence more than eight times the maximum authorized by state law should be disfavored be-

cause it might "'extend[] the ordeal of trial for both society and the accused,'" "interfere[] with the government's ability to exact retribution," or "frustrate[]" the State's ability to convince respondent that he is "justly subject to sanction." U.S. Br. 10-11 (quoting *Engle*, 456 U.S. at 126-127).

c. Cases involving demonstrable ineligibility for a particular sentence should also impose little burden on federal judicial resources. There is no evident reason why there should be many claims of the sort at issue in this case. The number of individuals who can credibly state a claim of *statutory ineligibility* for the sentence they are serving should (one hopes) be very small. Moreover, the basic plausibility or implausibility of such a claim should generally be apparent on the basis of a minimal examination; and even full factual evaluation of a credible claim should seldom require any significant commitment of resources. *See Sawyer*, 505 U.S. at 345-346 (noting "relative ease" of assessing sentence-ineligibility claims). In this case, even without the State's concession that respondent did not satisfy the statutory criteria for the sentence he received, a reviewing court could have made that determination simply by comparing the requirements of the Texas statute under which respondent was convicted and sentenced to the objective, readily ascertainable facts concerning the timing of his prior convictions.[11]

For these reasons, the same balancing of interests that the Court has previously employed in giving content to the miscarriage-of-justice exception leads to the conclusion that where a habeas petitioner can demonstrate statutory ineligibility for the penalty that has been imposed on him, federal habeas should be available to discharge its traditional function of correcting a sentence that the sentencing court was

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[11] The stringent standards the Court has imposed for invoking the miscarriage exception also ensure that it will be applied only in rare, meritorious cases. *See Schlup*, 513 U.S. at 326-330 (comparing standards for evaluating claims of "actual innocence"). Respondent's claim would be cognizable under either the *Sawyer* standard or the somewhat more lenient *Carrier* standard. *See id.*; *see also supra* pp. 18-19.

not legally authorized to impose. The State therefore misses the point with its argument that the Court should not "expand" the miscarriage exception. Pet. Br. 21. Although the Court has not previously had occasion to apply the exception in the context of non-capital sentencing, this case requires only application, not extension, of the Court's previous reasoning.[12]

3. The United States, as amicus, correctly describes the balancing of interests that this Court has used to define the miscarriage exception (U.S. Br. 14), and grudgingly recognizes (*id.* at 20-21) that it would be both "logical" and "administrable" to define a category of, at a minimum, sentencing errors resulting from the improper application of "factors that increase the statutory maximum sentence."[13] The United States also candidly acknowledges (*id.* at 21; *see id.* at 8-9, 27) that because this Court has held that most such factors are or must be treated as elements of aggravated

[12] The State also argues that respondent is relying on a "legal technicality" (Pet. Br. 23), and that he is not "actually innocen[t]" of his sentence as that term is "[n]ormally" used (*id.* at 21). Failure to satisfy the statutory requirements for a ten-fold enhancement in the statutorily authorized maximum sentence for an offense is a "technicality" only in the same sense that a failure of proof on a necessary aggravating factor or other "element[] of [a] capital sentence" would make one only technically "innocent of the death penalty." *Sawyer*, 505 U.S. at 345.

[13] To affirm the Court of Appeals, this Court need hold only that where, as here, a petitioner is demonstrably innocent of the factual predicate that rendered him eligible for a sentence in excess of the otherwise applicable statutory maximum, procedural default may be excused. Accordingly, the United States' extended discussion of sentencing factors that merely affect the exercise of the sentencer's discretion within a statutory maximum term, or that shift the applicable Sentencing Guidelines range within a statutory maximum (U.S. Br. 16-19), is irrelevant to the question presented by this case. Nothing in this case requires the Court to "exten[d] . . . the actual innocence exception to the myriad facts that have an impact on non-capital sentences" (*id.* at 17), or justifies any fear that such an exception could "swallow the rule" (*id.* at 19). The question whether, under some circumstances, the actual innocence principle could also apply to, for example, facts resulting in an increase in the statutory minimum sentence, or facts resulting in the application of a higher range under applicable non-statutory sentencing guidelines, can and should be left for another day.

offenses, the miscarriage exception "would appear already to apply" to any such factor "other than recidivism." Perplexingly, however, the United States goes on to argue that the exception should not be "extended" to recidivism-based statutory aggravators (*id.* at 22-24)—even though it straightforwardly recognizes elsewhere (*id.* at 19) that there is "no logical reason" to treat "habitual or career offender status" differently from any "other factual finding" for purposes of determining whether a habeas petitioner can show "actual innocence" with respect to a sentencing claim.

The United States purports to justify distinguishing recidivism from other statutory factors that render a defendant eligible or ineligible for a particular sentence by asserting (*id.* at 22-23) that treating recidivism the same way for purposes of the miscarriage-of-justice exception would somehow upset "the balance between the societal interest in obtaining closure to the criminal process and the individual interest in avoiding fundamental injustice."[14] The few actual arguments it offers to support that assertion are, however, hopelessly threadbare.[15] Although it is true that this Court

[14] Contrary to the suggestion in this phrasing, the "interest in avoiding fundamental injustice" through the appropriate use of habeas is societal, as well as "individual."

[15] It would, no doubt, surprise most habeas petitioners, including respondent, to learn that their "interest in avoiding fundamental injustice" was fully engaged by any non-recidivism statutory aggravator, because of the "unique stigma and collateral consequences" attendant on conviction of any aggravated offense (U.S. Br. 23)—but not materially implicated by, say, a recidivism aggravator that was misapplied to increase the statutory maximum punishment for their offense from two years' to 20 years' imprisonment. It is likewise rather surprising for the United States to suggest (*id.*) that simply because recidivism factors that enhance statutory maximums are "quite common," federal habeas courts are likely to incur "significant costs" if this Court confirms that *demonstrably erroneous applications* of those factors that unlawfully increase defendants' sentences, and are not corrected at trial, on direct review, or on state habeas, may be addressed on federal habeas even if the petitioner cannot show "cause" for an earlier procedural default. Finally, it is surely unbecoming for the United States to argue (*id.* at 24) that because the particular career offender provisions that Texas and other States have chosen to enact can sometimes be "quite technical," it would be unduly bothersome for the federal courts to take cognizance of an otherwise defaulted claim that "re-

limited the constitutionalization of offense elements in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), to non-recidivism factors that increase statutory maximum punishments (U.S. Br. 22), that limitation has no logical bearing on this case. To the contrary, one rationale underlying the limitation is that unlike many statutory aggravators, prior convictions are typically easy to ascertain and prove, and indeed are seldom subject to actual dispute. *See Apprendi*, 530 U.S. at 488; *Almendarez-Torres* v. *United States*, 523 U.S. 224, 235 (1998). As noted above, in the present context, that observation suggests the minimal burden that would be imposed on federal habeas courts by the occasional case, such as this one, in which a habeas petitioner rests a credible claim of sentence-ineligibility on the existence, nature, or timing of one or more previous convictions.[16]

In short, as explained above, the miscarriage-of-justice standard is an equitable "safety valve," designed to ensure that federal habeas remains available to remedy injustice in appropriate cases, even when relief would otherwise be barred because of some procedural default. In shaping and applying the exception, the Court has looked both to the historic uses of habeas, and to an equitable balancing of the interests in justice, finality, comity, and judicial efficiency. On any view of the relevant history, imposition of a sentence in excess of statutory authority has long been considered just the sort of fundamental injustice that the Great Writ should be available to correct. And in a case such as this one, in which systemic burdens are minimal and the interest in jus-

late[s] only to the length of [respondent's] sentence." Given the facts of this case, there is no apparent basis for the claim (Br. 24-25) that any rule that would apply here could not be "limited to the 'extraordinary case' . . . [or] to instances involving a fundamental miscarriage of justice."

[16] To the extent the State or its amici mean to suggest that, in light of *Apprendi*, a sentence longer than the statutory maximum involves a less serious error when it results from erroneous factual findings regarding recidivism, their argument is particularly weak in this case. Texas law permits a habitual-offender enhancement only when the fact and timing of the defendant's prior convictions have been found by the jury beyond a reasonable doubt. *See Williams* v. *State*, 899 S.W.2d 13, 14 (Tex. Ct. App. 1995).

tice large, the balance should surely be struck in favor of allowing the federal courts to hear and determine respondent's habeas claim.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In The
Supreme Court of the United States

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Petitioner,

v.

MICHAEL WAYNE HALEY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF ZACHARY W. CARTER, PAUL E. COGGINS, JANICE McKENZIE COLE, TIM CONE, WILLIAM THOMAS DILLARD, VIC FEAZELL, JAMES P. FINSTROM, ODIS R. HILL, ERIC H. HOLDER, JR., TIM JAMES, JAMES E. JOHNSON, B. TODD JONES, HARRY LITMAN, JOHN S. MARTIN, JIM MATTOX, DENISE E. O'DONNELL, JANET F. RENO, JAMES K. ROBINSON, JAMES A. ROLFE, NICHOLAS J. SPAETH, O.G. STANLEY, JOHN K. VAN DE KAMP, ALAN VINEGRAD, MARK WHITE, AND RONALD G. WOODS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals correctly excused a procedural default where the habeas corpus petitioner was actually innocent of being a habitual felony offender under state law.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are current and former law enforcement officials – including former federal and state attorneys general, past and present district attorneys from the State of Texas where this case arose, and former United States Attorneys – who, throughout their years of public service, have regularly confronted the challenges presented by habeas corpus cases, either in litigating the petitions or handling the remanded criminal cases that occasionally resulted. Each understands the need for robust procedural rules that safeguard our criminal justice system from the potentially overwhelming burden of frivolous claims for collateral review that convicted offenders would otherwise raise. Based on their experience, *amici* know that prosecutors best serve and protect the public by focusing their efforts on investigating unsolved crimes and prosecuting unconvicted offenders, and that those tasks are too often hampered by the need to respond to meritless habeas petitions.

Amici also know, however, that procedural default rules are themselves designed to serve justice, and have accordingly been crafted with appropriate exceptions to safeguard against fundamental miscarriages of justice. Prosecutors do not need and should not want any rule that prevents correction of a fundamental injustice like the one in this case. To the contrary, it is critically important to

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[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. This brief was written by counsel for *amici curiae*. No person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), the parties have consented to the filing of the brief of *amici curiae* and their letters of consent accompany this brief. The *amici* herein are individually identified in the Appendix.

the success of their mission that prosecutors be seen by all – the victims and witnesses with whom they work, the judges before whom they appear, and the jurors who come to court every day – as serving a system that is committed to justice rather than victory at all costs. The inflexible application of an otherwise reasonable procedural default rule can only undermine that vital interest when it results in the fundamental injustice of subjecting a defendant to over a decade of imprisonment for which he is unquestionably ineligible under state law.

We write to urge the Court to affirm the judgment below because there is no inconsistency in this case between the interest in aggressive, effective law enforcement and the interest in justice. This Court can uphold the result agreed upon by the magistrate judge, the district court, and the court of appeals and still maintain an effective, workable default rule that allows the exceptions that will ultimately enhance prosecutors' effectiveness.

INTRODUCTION AND SUMMARY OF ARGUMENT

Texas has punished respondent for a "second degree felony." Tex. Penal Code Ann. § 12.42(a)(2) (West 2003). It is undisputed that he is factually innocent of that second degree felony. This is not a case about federalism; it is about whether the writ of habeas corpus remains a bulwark against the fundamental injustice of knowingly imprisoning an innocent person.

Respondent stole a calculator from Wal-Mart. Because of his prior theft convictions, respondent's crime in this case was a "state jail felony" punishable by up to two years in state prison. *Id.*, §§ 12.35(a), 31.03(e)(4)(D). He was not punished for this crime, however, but for the aggravated offense of having committed a "state jail felony" as a habitual felon, which is a "second degree felony" punishable by up to 20 years of imprisonment. *Id.*, § 12.42(a)(2).

The habitual offender statute requires a fact not present in this case: that the second of the two predicate prior felonies have been committed after the defendant's conviction of the first. The State of Texas concedes that this element was lacking in respondent's case, but nevertheless seeks to return respondent to prison to serve out the remainder of the 16-and-a-half-year sentence imposed on him as a result of the mistake.

I. Texas and its supporting *amici* incorrectly suggest that this Court can affirm the judgment below only by breaking new ground and creating a vast new exception to procedural default rules that would otherwise bar claims of "actual innocence of sentence" in non-capital cases. To the contrary, allowing respondent to pursue his habeas claim and obtain relief from his illegal sentence is squarely in line with this Court's precedents.

Because respondent is innocent of the sole fact that rendered him statutorily eligible for a ten-fold increase in punishment, this Court's previous decisions allow him to obtain relief notwithstanding his earlier procedural default. Under settled law, procedural default can and should be excused in a habeas case where necessary to avoid a fundamental miscarriage of justice. Such miscarriages of justice can occur when a defendant is convicted of a crime he did not actually commit, *Murray v. Carrier*, 477 U.S. 478 (1986), as well as when a defendant is sentenced to death on the basis of a penalty phase fact-finder's erroneous determination that aggravating circumstances exist. *Sawyer v. Whitley*, 505 U.S. 333 (1992). In developing this concept of "actual innocence," the Court has consistently focused on facts that render a habeas petitioner statutorily eligible for the criminal sentence from which he or she seeks relief. That principle is plainly applicable to respondent's case.

For habeas petitioners challenging criminal sentences, there is no reason to limit the cases applying the actual innocence doctrine to the death penalty context in which they arose. Contrary to Texas's claims, this Court has never endorsed, and has in fact rejected, the idea that capital and non-capital cases should be treated differently with respect to the procedural rules governing habeas claims. *See, e.g., Herrera v. Collins*, 506 U.S. 390, 405 (1993); *Smith v. Murray*, 477 U.S. 527, 538 (1986). Moreover, the analysis the Court employed in *Sawyer v. Whitley* applies with equal force to non-capital sentencing, and in particular to this case. Just as a capital defendant can be considered actually innocent of "aggravated" murder by virtue of the fact that he did not engage in the conduct that renders him death-eligible, respondent must be considered actually innocent of the second-degree felony for which he was sentenced because his prior felony convictions were not committed in the sequence required under Texas law. The exception to procedural default rules that respondent seeks is therefore entirely consistent with this Court's prior decisions regarding both the meaning of "actual innocence" and the relationship between elements of an offense and facts relevant to sentencing. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000).

This logic cannot be defeated by citing the decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), for the proposition that a recidivism-based sentencing enhancement does not create an aggravated offense within the meaning of *Apprendi*. First, to the extent *Almendarez-Torres* so holds, it is no longer good law. *See Apprendi*, 530 U.S. at 489-490; *id.* at 520-521 (Thomas, J., concurring). In addition, and just as important, the fact that Texas now concedes is lacking in respondent's case – the sequence of his prior convictions rather than their existence – is an element of the Texas law that is entirely unrelated to

whatever force the *Almendarez-Torres* recidivism exception ever had. Thus, even if *Almendarez-Torres* remains good law, there is no principled reason to apply it as the basis for denying respondent's claim.

II. Recognizing that respondent's claim is consistent with prior case law does no harm to the important interests of comity and finality. The interest of comity is no more at risk here than it was in the previous "actual innocence" cases that Texas seeks to distinguish. In each, the decision by a federal court to excuse procedural default is warranted because doing so vindicates the State's substantive criminal law. Federal courts no more disparage a State's laws when they allow a claim like respondent's to proceed than they do in allowing the kind of claim that Texas concedes involves "actual innocence."

Allowing respondent's claim to proceed also respects society's interest in the finality of criminal judgments. A decade of experience in the jurisdictions that currently recognize, in non-capital sentencing cases, an actual innocence exception to default rules demonstrates that adopting such a rule at the national level will not burden prosecutors or courts with a rash of meritless claims. On the other hand, if this Court were to crimp the actual innocence rule in the manner Texas urges, it would create a class of cases, however small, in which a fundamental miscarriage of justice would deliberately be allowed to stand uncorrected. Such a result would breed distrust of the criminal justice system, and in particular of prosecutors' role in it. The costs of such distrust would far outweigh the limited costs of allowing the rare habeas petitioner in respondent's circumstances to proceed with an otherwise defaulted claim.

ARGUMENT

I. THE IMPOSITION OF A SENTENCE FOR WHICH A DEFENDANT IS STATUTORILY INELIGIBLE IS A FUNDAMENTAL MISCARRIAGE OF JUSTICE.

A. The Touchstone For The "Actual Innocence" Exception Under *Sawyer v. Whitley* Is Statutory Eligibility For The Sentence Imposed.

This Court has recognized that a federal court may decide a petition for habeas corpus on the merits, even though the prisoner has failed to show cause for, and prejudice from, the procedural default of a constitutional claim, so long as the court's failure to hear the claim would constitute a fundamental miscarriage of justice. *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986); *Murray v. Carrier*, 477 U.S. 478, 496 (1986). The paradigmatic miscarriage of justice is the conviction of a person who is actually innocent of the crime of conviction, but the Court has also reviewed criminal sentences to determine whether imposition of a particular sentence was a fundamental miscarriage of justice. *See Sawyer v. Whitley*, 505 U.S. 333, 340-41 (1992); *Dugger v. Adams*, 489 U.S. 401, 412 n.6 (1989); *Smith v. Murray*, 477 U.S. 527, 537-38 (1986).

Each time the Court has applied the exception in the context of sentencing, it has acknowledged the semantic awkwardness of applying the phrase "actual innocence," but has nevertheless proceeded to determine whether a fundamental miscarriage of justice occurred. Texas and its *amici* rely on the fact that each of these cases is a capital case, from which they conclude that capital cases represent a limited extension of an "actual innocence" exception, beyond the concept's natural boundaries. *See* Pet. Br. at 24-26; U.S. Br. at 14-16; Ill., *et al.* Br. at 11-13. They

thus implicitly argue that cases such as *Sawyer*, *Dugger*, and *Smith*, represent an application of the "death is different" principle. To the contrary, those cases demonstrate that the "actual innocence" exception can and should be consistently applied to any error – whether committed at the guilt or sentencing phase – that wrongly renders a defendant eligible for an increased statutory maximum sentence.

With respect to its habeas jurisprudence, this Court has declined to treat capital and non-capital cases differently. *See, e.g., Herrera v. Collins*, 506 U.S. 390, 405 (*quoting Murray v. Giarratano*, 492 U.S. 1, 9 (1989) (plurality opinion)) ("we have 'refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus' "). *Smith v. Murray* acknowledges this point explicitly. The *Smith* dissent faults the Court for ignoring that "death is a different kind of punishment from any other." 477 U.S. at 545 (Stevens, J. dissenting) (internal quotation omitted). Addressing this argument, the Court responds that the "death is different" principle does not apply in determining whether a petitioner must prove cause and prejudice:

> We reject the suggestion that the principles of *Wainwright v. Sykes* apply differently depending on the nature of the penalty a State imposes for the violation of its criminal laws.

Id. at 538. A fundamental miscarriage of justice requires evidence that constitutional error "undermined the accuracy of the guilt or sentencing determination," the Court explained. 477 U.S. at 539.

In *Sawyer v. Whitley*, the Court reaffirmed that a habeas petitioner can establish actual innocence of a criminal sentence without proving actual innocence of the crime itself, but it set forth a more demanding test for doing so. 505 U.S. at 343-45. *Sawyer* held that establishing actual innocence under a capital sentencing statute

required a petitioner to prove that a "condition of eligibility had not been met," including, for example, that there were no aggravating circumstances. *Id.* at 345. The Court adopted this "eligibility" test as its definition of actual innocence because eligibility relies on "objective factors." *Id.* at 347. A federal district judge can reasonably determine whether a habeas petitioner's evidence negated the existence of an objective fact necessary to render a defendant eligible for the enhanced sentence. *Id.* at 345-46. The Court contrasted the more open-ended, discretionary determination about which sentence to select from among those for which the prisoner was undisputedly eligible, and held that factual errors at that stage of the proceeding did not excuse cause and prejudice. *Id.* at 345-46.

Given the Court's rationale, there is no principled reason to limit *Sawyer* to the death penalty context. The same analysis the Court employed in that case applies with equal force to non-capital sentencing.[2] In essence, there are three determinations that precede the imposition of sentence in any case, capital or otherwise: (1) whether the defendant may be punished at all, *i.e.*, the factual determination as to whether he is guilty of a crime; (2) the statutory maximum sentence for the particular crime of conviction, which can increase if additional facts are found at sentencing; and (3) the discretionary selection of a sentence, from among those for which the prisoner is eligible under the law. Under *Sawyer*, the first two are amenable to "actual innocence" analysis: a mistaken determination leads to a punishment not authorized by

[2] In *Sawyer*, as in *Smith*, it was not the Court, but those who favored a more expansive definition of a "fundamental miscarriage of justice," who argued the qualitative and moral differences between death and non-capital sentencing. *See* 505 U.S. at 361 (Stevens, J. concurring in the judgment).

law, a result that is fundamentally unjust.[3] The third is not subject to such analysis, in that even an incorrect understanding of the facts, while it may affect the sentencer's exercise of discretion, will not result in a sentence greater than the statute allows. The distinction explains, for example, why error relating to mitigating circumstances (which are relevant only to the exercise of discretion in capital cases) was held insufficient to trigger the fundamental miscarriage of justice exception to the procedural default rule in *Sawyer*, 505 U.S. at 345-346.

Thus, the lesson of *Sawyer* is that where, in the absence of constitutional error, no reasonable jury would have found a sentencing fact (including any aggravating circumstance) to be true, a habeas petitioner is "actually innocent" of that sentencing fact and of the enhanced sentence imposed as a result of it. 505 U.S. at 347. Here, because no reasonable jury would – or even could – have found that respondent met the requirements of Texas's habitual felony offender statute, respondent is actually innocent of being a habitual felony offender and of the 16-and-a-half-year sentence imposed. Had he not been falsely identified as a habitual offender, he would not have been eligible for this sentence. Accordingly failure to consider his constitutional claim of insufficient evidence would constitute a fundamental miscarriage of justice.

In short, although the State of Texas and its *amici* attempt to rely on the principle that "death is different" to limit *Smith* and *Sawyer* (*see, e.g.*, *Amicus* Br. of State of

[3] *Cf. Sawyer*, 505 U.S. at 345 ("Sensible meaning is given to the term 'innocent of the death penalty' by allowing a showing in addition to innocence of the capital crime itself a showing that there was no aggravating circumstance or that some other condition of eligibility had not been met.").

Illinois, *et al.* at 14), the Court has declined to apply this concept in defining a fundamental miscarriage of justice. It has consistently refused to distinguish in its habeas jurisprudence between death penalty cases and non-capital sentencing. And it has analyzed actual innocence of a criminal sentence in a way that applies equally to capital and non-capital sentencing. Because respondent is not eligible under Texas law for the 16-and-a-half-year term to which he was sentenced, a fundamental miscarriage of justice has occurred.[4]

[4] In making this argument, we do not question the validity of the "death is different" jurisprudence that the Court has developed with respect to the substantive and procedural safeguards that the Constitution requires before a death sentence may be imposed. We merely note that the Court itself has never relied on that jurisprudence to distinguish capital cases from non-capital ones with respect to procedural default rules on habeas review.

Moreover, such a distinction would not accord with the rationale for the "death is different" case law. One of the primary reasons that death is a qualitatively different punishment from all others is that it is irremediable. *See, e.g., Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J. concurring); *id.* at 345-46 (Marshall, J. concurring). By contrast, the erroneous imposition of a non-capital sentence is not inherently irremediable – but the application of a procedural default rule can make it so. In other words, death is *not* different with respect to the rule at issue here. What sets death apart from other punishments is precisely what the "actual innocence" rule is designed to guard against: the risk that a fundamental miscarriage of justice will stand uncorrected. Viewed in that light, the only pertinent difference that remains between this case and cases such as *Sawyer*, *Dugger*, and *Smith* is the difference between two injustices; one – executing an innocent person – is admittedly worse than the other, but both are untenable under our nation's system of justice. Texas's insistence on such a distinction in the name of comity and finality reduces, ultimately, to nothing more than "a fear of too much justice." *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

B. Where A Prisoner Shows Actual Innocence Of A Fact Used To Increase The Statutory Maximum Penalty, The Miscarriage Of Justice Exception Applies.

Amici in support of Texas attempt to avoid the clear teaching of *Sawyer v. Whitley* and its antecedents by radically reinterpreting those cases. Their startling conclusion is that "this Court has never held that 'actual innocence' of a sentence can excuse . . . procedural default." (Ill., *et al.* Br. at 7; *accord* U.S. Br. at 26.) As reinterpreted by *amici*, *Smith* and *Sawyer* do not allow for proof of actual innocence of a capital sentence, but are "best understood as involving actual innocence of an aggravated offense." (U.S. Br. at 26; *accord* Ill., *et al.* Br. at 9.)

The problem with this argument is that it stops short. If actual innocence of a capital sentence is best understood as actual innocence of an aggravated offense – namely, murder plus aggravating circumstances – then the Court should apply the same reasoning to respondent's conviction as well. Under such analysis, respondent's imprisonment for more than 16 years can only be understood as the result of his conviction for the aggravated offense of theft by a habitual felony offender. Yet respondent is "actually innocent" of this aggravated offense. Thus, even under the analysis favored by *amici*, a fundamental miscarriage of justice has occurred.

1. Under *Apprendi*, Respondent's Sentencing Under The Habitual Felony Offender Law Is Equivalent To A Conviction For An Aggravated Offense.

The United States and certain states as *amici* supporting Texas claim to find support for their argument in the line of cases exemplified by *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The question in *Apprendi* was

whether the Constitution requires a factual determination to be made by a jury on proof beyond a reasonable doubt, if the result of that fact is to increase the statutory maximum possible prison sentence a defendant may receive. 530 U.S. at 469. In New Jersey, the statutory maximum the state could impose for illegal possession of a firearm doubled, from 10 to 20 years, as a result of a judicial finding under the state's hate-crime statute that the defendant committed the crime with racial intimidation as his purpose. *Id.* at 468-69. The state court treated this hate-crime finding as a "sentencing factor" rather than an element of a criminal offense and allowed a judge to determine it. *Id.* at 471-72. This Court concluded, however, that "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494. If so, "it is the functional equivalent of an element of a greater offense," and must be found by the jury beyond a reasonable doubt. *Id.* at 490, 494 n.19.

In this case, the finding that respondent was a habitual felony offender is the functional equivalent of an element of a greater offense. It mistakenly renders respondent guilty of a crime that might be called "felony theft by a habitual offender." Had the jury understood that respondent did not have a criminal history sufficient to qualify him as a habitual offender under Texas law, he could have been convicted only of the lesser "state jail felony," and he could have been imprisoned for not more than two years. J.A. 8-9; *see* Tex. Penal Code Ann. §§ 12.35(a), 31.03(e)(4)(D) (West 2003). Because he was incorrectly found to have been a habitual felony offender, he was "punished for a second-degree felony" instead. Tex. Penal Code Ann. § 12.42(a)(2) (West 2003). The statutory minimum sentence for a second-degree felony is 2 years; the maximum is 20 years. *Id.* § 12.33(a). Respondent

received a 16-and-a-half-year sentence, which was within the range of the greater offense only. This is an offense that even the State of Texas concedes respondent did not commit. J.A. 33-34. Thus, respondent is actually innocent of the offense for which he was sentenced, just as a capital defendant may be said to be innocent of the offense of first degree murder plus aggravating circumstances. In both cases, a fundamental miscarriage of justice occurs.

2. The United States Concedes The Injustice Of A Sentence For Which The Recipient Is Statutorily Ineligible, But Mistakenly Exempts Respondent's Case From This Rule On The Grounds That His Sentence Was Enhanced For Recidivism.

The United States, as *amicus*, concedes that the actual innocence exception applies in most cases where the defendant's eligibility for a higher statutory maximum sentence is based on an incorrect factual determination, but it carves out a narrow exception to that rule that would deny respondent relief in this case. The Solicitor General's brief states:

> the actual innocence exception would appear already to apply to facts *other than recidivism* that increase the statutory maximum sentence. Such facts are elements of an aggravated substantive offense – either because the legislature has designated them as offense elements or because the Constitution requires that they be treated that way.

U.S. Br. at 21 (emphasis added).

This application of *Apprendi* is correct, as far as it goes. Suppose respondent's conviction had been for burglary, and the reason his sentence was increased from a statutory maximum of two years to over 16 years was,

rather than the existence of prior convictions, a finding that the burglary had been committed at night. Suppose further that respondent had subsequently proven that he committed the burglary during the daytime. If a finding that the crime was committed at night would have increased his exposure from two to 20 years of imprisonment, *Apprendi* requires that it be treated as the functional equivalent of an element. Had this been the case, the United States acknowledges that respondent would have established actual innocence of the sentence he received. The United States thus concedes that normally the imposition of a non-capital sentence for which a defendant is statutorily ineligible is a fundamental miscarriage of justice.

The problem lies in the attempt to exempt from this analysis recidivism cases in general, and respondent's case in particular. As explained below, the continued reliance by the United States on the precedent of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), is misplaced given subsequent decisions by this Court. But even if *Almendarez-Torres* remains good law, it is inapposite to this case because respondent's sentence was not enhanced simply on the basis of his convictions for prior felony offenses, but also on the basis of the sequence of those prior convictions – an enhancement not within the scope of the rule of *Almendarez-Torres*.

a. The Rule Of *Almendarez-Torres* Has Effectively Been Abandoned.

The United States argues that recidivism should be treated differently because this Court explicitly limited its holding in *Apprendi* to factors other than recidivism. U.S.

Br. at 22.[5] That argument ignores the vestigial nature of the exception for recidivism in *Apprendi*. Two terms before deciding *Apprendi*, this Court had given a different answer to a similar question, in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *Almendarez-Torres* held that the Constitution does not require an allegation of recidivism to be treated as an element of an offense, even when its proof increases the statutory maximum sentence for which a defendant is eligible. *Id.* at 239. Almendarez-Torres's challenge was unusual, in that he admitted his recidivism when pleading guilty to the charged offense, but subsequently argued constitutional error in its omission from the indictment. *Id.* at 227; *Apprendi*, 530 U.S. at 488. The Court was closely divided in rejecting his challenge, with four Justices in dissent. Justice Thomas, who voted with the majority in *Almendarez-Torres*, has since acknowledged the decision as "an error." *Apprendi*, 530 U.S. at 520 (Thomas, J. concurring). Concurring in *Apprendi*, Justice Thomas set forth a thorough rationale for treating as an element of the offense every fact that is by law a basis for imposing or increasing the statutorily authorized punishment, including the fact of a prior conviction. *Id.* at 501.

The Court's opinion in *Apprendi* comes close to acknowledging a proposition the United States deflects, that *Almendarez-Torres* is no longer good law. *Apprendi* did not explicitly overrule *Almendarez-Torres*, as Apprendi had not contested the validity of the earlier case. *Id.* at 489-90.

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[5] That the Solicitor General should propose such an exception is itself odd, given that his brief argues there is no principled basis for distinguishing between sentencing enhancements based on the fact of a prior conviction and those based on other kinds of facts. U.S. Br. at 19-20.

But the Court cautioned, "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested." *Id.* Justice Thomas's concurring opinion goes further, leaving little doubt that an exception for recidivism does not command the support of a majority on the Court. 530 U.S. at 520-21 (Thomas, J. concurring). In subsequent cases, the Court has applied *Apprendi* several times, but has not had occasion to provide *Almendarez-Torres* a respectable burial. *See, e.g., Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003); *Ring v. Arizona*, 536 U.S. 584 (2002). In rejecting the argument of the United States in this case, the Court should now overrule *Almendarez-Torres*, or limit it to its facts. *See* 530 U.S. at 490.

Even if *Almendarez-Torres* were to survive, this Court should not import the distinction to which it gave rise (between the fact of a prior conviction and any other fact used to extend the statutorily authorized maximum sentence) into its habeas jurisprudence. *Apprendi* distinguished, rather than overruled, *Almendarez-Torres* in part because, in the context of those cases, the Court saw a vast difference between the fact of a prior conviction and other sentencing facts. *Id.* at 496. A prior conviction is uniquely the result of an earlier proceeding in which the defendant enjoyed full constitutional protections, including the requirement of proof beyond a reasonable doubt to a jury, and the Court relied on these previously provided protections to mitigate the Sixth Amendment and due process concerns that otherwise dictated its decision in *Apprendi*. *See id.* at 488. Yet the premise of an actual innocence claim is that fact-finding in the instant trial court went awry. Where faulty fact-finding can be shown, it is no answer to point to the procedural safeguards in place to guard against it. If *Almendarez-Torres* retains any precedential value, it must not be extended to prevent habeas petitioners from having their constitutional claims heard

on the merits, where they can prove that they are actually innocent of the sentence imposed on them.

b. Even If *Almendarez-Torres* Remains Good Law And Limits The Definition Of "Actual Innocence," It Does Not Apply Here Because The Essential Element Of Which Respondent Is Actually Innocent Is The Sequence Of His Prior Convictions, Not Their Validity.

The Solicitor General elides an important distinction between two different aspects of the habitual felony offender statute that has been applied in respondent's case: the existence of the two prior felony convictions and their timing relative to each other. He relies on *Almendarez-Torres* for the general proposition that "facts concerning recidivism remain sentencing factors and need not be made elements even if they raise the statutory maximum." (U.S. Br. at 8). But in doing so, the United States strays from the rationale under which this Court squared its decision in *Apprendi* with the rule of *Almendarez-Torres* – a rationale that other *amici* have acknowledged in their brief. As the Court explained in *Apprendi*:

> Both the certainty that procedural safeguards attached to any "fact" of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that "fact" in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a "fact" increasing punishment beyond the maximum of the statutory range.

530 U.S. at 488 (cited in *amici* Br. of State of Illinois, *et al.* at 10).

Here, of course, the erroneous "fact" that has increased respondent's sentence – namely, the proposition

that respondent's prior felony offenses were committed in a particular order – is one that was never accorded procedural safeguards prior to respondent's conviction below. Indeed, it is not only challenged as inaccurate, it is indisputably so. In other words, if respondent's complaint was that he was factually innocent of one of the prior felonies, then his claim would rise no higher than Almendarez-Torres's claim, because he would have had constitutionally adequate procedures available to raise such a claim long before that felony conviction served to increase his sentence in the instant case. But that is not respondent's claim. His claim is one that he could not have vindicated before the instant case because it was never previously relevant to his punishment: it is a claim that although he was guilty of each of two prior felony offenses, he is innocent of the separate allegation that he committed those crimes in a sequence that renders his subsequent theft of a calculator a second degree felony.

The two elements of the habitual felony offender statute under which respondent was punished are conceptually distinct. One element, as to which respondent raises no claim of actual innocence, is the requirement of convictions for two prior felony offenses. The second, at issue in this case, is the sequence in which those offenses were committed. Specifically, the pertinent provision of Texas law allows the 20-year maximum sentence to which respondent was exposed to be imposed only where the defendant committed a second prior felony offense after having been convicted of the first. Tex. Penal Code Ann. § 12.42(a)(2) (West 2003). As in many other recidivism-based sentence enhancement laws, this "sequence" element identifies as more serious offenders not just anyone who has committed multiple felonies in the past, but those who have done so in a way that signals a resistance to rehabilitation. The offender who commits a second crime after being sentenced for the first and being confronted

with the consequences of his misconduct is plainly a greater risk to society than one who commits two crimes before being sentenced. A legislature can take such a difference into account in crafting its habitual felony offender laws, and in doing so it creates an element of an aggravated offense that is very different from the simple recidivism enhancement that passed constitutional muster in *Almendarez-Torres*.[6]

In short, even if *Almendarez-Torres* remains good law and serves to limit the definition of "actual innocence," it cannot justify the exclusion of respondent's case from the rule the Solicitor General concedes applies. That rule would apply the actual innocence exception to any claim of innocence with respect to a fact that would trigger the rule of *Apprendi*. Because the "sequence" element of the Texas habitual felony offender statute is not the kind of pure recidivism-based enhancement that the *Apprendi* court left in place, respondent's sentence must be considered the result of an aggravated offense of which he is actually innocent. For that reason, his procedural default can properly be excused under this Court's long-standing precedent.

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[6] The Texas legislature has created just such a statutory scheme, and Texas courts have recognized the sequence element as essential to eligibility for the higher maximum sentence. *See e.g.*, *Tomlin v. Texas*, 722 S.W.2d 702, 705 (Tex. Crim. App. 1987); *Armendariz v. Texas*, 294 S.W.2d 98, 99 (Tex. Crim. App. 1956).

II. SOCIETY'S INTEREST IN EFFECTIVE LAW ENFORCEMENT IS BEST SERVED BY ALLOWING THE CORRECTION OF A FUNDAMENTAL MISCARRIAGE OF JUSTICE IN A CASE SUCH AS THIS.

As demonstrated above, allowing respondent to pursue his claim notwithstanding his earlier procedural default falls squarely within this Court's previous decisions regarding the scope of the actual innocence exception. But even if the decisions by the magistrate judge, the district judge, and the court of appeals to apply the actual innocence exception in this case could properly be viewed as an extension of prior case law, it is an extension that is both warranted in the interest of justice and fully consistent with society's legitimate interests in comity, finality and effective law enforcement. Those interests are of course always at stake when the Court considers exceptions to procedural default rules. But as the Solicitor General has acknowledged, "application of the actual innocence exception to aggravated offenses does not upset the balance between the societal interests in finality, comity, and conservation of judicial resources and the individual interest in protection from fundamental unfairness embodied by the exception." U.S. Br. at 22.

Just as each of those interests can properly be balanced against the need to guard against fundamental injustice in the context of someone who did not commit any crime, or who is innocent of facts that support a non-recidivism-based sentencing enhancement beyond the statutory maximum, so too can each be considered here – not as a trump card that moots any consideration of fundamental fairness, but as one interest among several that must be weighed in vindicating society's interest in robust law enforcement. As this Court has previously noted, "'"[i]n appropriate cases" the principles of comity

and finality that inform the concepts of cause and prejudice "must yield to the imperative of correcting a fundamentally unjust incarceration."'" *Smith v. Murray*, 477 U.S. at 537 (quoting *Carrier*, 477 U.S. at 495).

A. Allowing An Exception To Procedural Default Rules In Respondent's Case Respects The Interest Of Comity.

As Texas frames the issue, the Court should be reluctant to apply its "actual innocence" jurisprudence in part because doing so "carries the added affront to the States' position in the federal system." Pet. Br. at 13. The State goes on to explain, "'Our federal system recognizes the independent power of a State to articulate societal norms through criminal law.' . . . The power of a State to pass laws means little, however, if the State cannot enforce them." *Id.* (quoting *McCleskey v. Zant*, 499 U.S. 467, 491 (1991)). Finally, Texas notes that federal intervention in criminal cases can "'frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" Pet. Br. at 14 (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)).

This articulation of the comity interest highlights why it is simply not at risk in this case – just as it is not at risk in the kinds of cases that Texas and its supporters would describe as "true" actual innocence cases. Texas does indeed have the right and the duty to enact substantive criminal laws that reflect the societal norms its citizens endorse, and it has done so here. It has written laws that prescribe a maximum punishment of two years imprisonment for anyone who has done what respondent has done: steal a calculator after having committed prior nonsequential offenses. If respondent could prove he was innocent of stealing the calculator, the State of Texas could not reasonably claim that allowing his otherwise defaulted

claim to proceed was an intolerable affront to its dignity. Federal courts no more disparage the State's interest in punishing offenders or respecting its laws when they allow a claim like the one respondent raises than they do in allowing the kind of claim Texas concedes squarely presents the issue of "actual innocence."

The comity interest is a wash in this case: no matter how federal courts resolve respondent's claim, they will inevitably vindicate one important state interest and override another. When a defendant is given a sentence for which he is ineligible under substantive state law but the state courts are unwilling to provide a remedy, federal courts confronted with a habeas petition cannot escape some comity-based criticism no matter how they rule. If they correct the substantive error, they overrule the state court's resolution of the case. But if they defer to the state court, they frustrate the clear intent of the state legislature in passing the substantive law. This Court's earlier decision to allow an actual innocence exception to procedural default rules in other contexts – where the claim is either innocence of the crime of conviction or of an aggravating circumstance or other statutory eligibility requirement a capital case – plainly show how those competing concerns should be balanced here.

B. Allowing An Exception To Procedural Default Rules In This Case Accords A Proper Respect For The Interest Of Finality.

Texas further suggests that granting respondent the relief he seeks here would represent a "[l]iberal use of the writ" which improperly "breeds disrespect for the finality of convictions and 'disparages the entire criminal justice system.'" Pet. Br. at 13 (quoting *McCleskey v. Zant*, 499 U.S. at 492). In particular, the State worries, somewhat counter-intuitively, that using the writ so readily might

actually encourage future defendants in respondent's position to "sandbag" state courts by "withhold[ing] claims for manipulative purposes." *Id.*

This concern is misplaced for at least three reasons. First, as experience has shown, the limited rule we propose will allow only a very few cases to proceed despite a procedural default. Second, we recognize, based on our experience as prosecutors, that the criminal justice system is far more seriously disparaged when it is susceptible to being perceived as a trap for the unwary rather than an instrument of justice.

Finally, even if such "sandbagging" is a valid concern in other contexts, Texas does not and cannot explain why future defendants faced with an indictment alleging predicate sequential felonies will withhold the fact that they were not actually sequential. Such defendants, like defendants who are actually innocent of the underlying criminal offense, would have nothing to gain and much to lose by intentionally sitting on such claims until the habeas stage, regardless of the outcome of this case. At a minimum, they would risk spending at least some time in needless incarceration while the claim worked its way through the courts. Ascribing such interests to future defendants would be as unjustified as inferring from the record in this case that the prosecutors who introduced the evidence of respondent's prior convictions were aware of the fact that they did not satisfy the substantive statutory requirement and simply counted on that fact escaping notice until it would be too late for respondent or the courts to correct the injustice.

1. Allowing An Actual Innocence Exception In A Case Like This Will Not Produce A Rash Of New And Meritless Claims.

In assessing the cost to the criminal justice system of granting respondent relief, the Court must be clear about

the limits of the rule we advocate today. We urge the Court to recognize only that the factually false determination that respondent was a habitual felony offender, as Texas law defines that term, resulted in a ten-fold increase in the statutory maximum term for which respondent was eligible. Respondent is "actually innocent" of the sole fact that triggered the increase in the statutory maximum sentence, and it is that fundamental miscarriage of justice that we ask the Court to correct. We do not advocate a rule that would allow a habeas petitioner in a jurisdiction employing guidelines sentencing to challenge as a fundamental miscarriage of justice a sentence *within* the prescribed statutory range.[7] That question is best left for another day, because here the facts fit a much more compelling pattern.

This Court has already decided that allowing defaulted habeas claims to proceed in cases where the

[7] The lower courts have not consistently analyzed the issue of whether a petitioner can mount such a challenge by proving that he or she is actually innocent of a fact used to increase the applicable sentencing guidelines range. *Compare, e.g., United States v. Maybeck*, 23 F.3d 888 (4th Cir. 1994), *with Poindexter v. Nash*, 333 F.3d 372 (2d Cir. 2003). Regardless of how that matter is ultimately decided, for purposes of this case it is sufficient to note that allowing an "actual innocence" exception with respect to facts that trigger eligibility for an increased statutory maximum sentence need not entail a similar exception with respect to guidelines calculations or mandatory minimum sentences, just as the result in *Apprendi* did not necessarily entail a rule that a fact triggering a mandatory minimum sentence must be treated as the functional equivalent of an element of the offense. *See Harris v. United States*, 536 U.S. 545 (2002). Accordingly, the rule we propose does not and need not affect the hundreds of cases each year to which the Solicitor General refers in which federal defendants challenge such factual matters as the weight of drugs or their role in the offense of conviction. *See* U.S. Br. at 18-19.

petitioner can demonstrate actual innocence of the underlying crime, or of an aggravating circumstance in a capital case, does not unduly harm society's interest in finality. The same is demonstrably true with respect to the class of claims – actual innocence of a fact that increases the statutory maximum sentence – represented by respondent's habeas petition. This is so even if the Court does not craft a recidivism-based exception into its definition of actual innocence, as the United States urges. Although the Solicitor General points out that many jurisdictions extend criminal sentences for repeat offenders (*see* U.S. Br. at 23-24 & n.6), the relevant inquiry is not the frequency with which recidivism enhancements are imposed, but how often they are challenged on the basis of actual innocence.

The experience in those circuits that have allowed such challenges is encouraging – as might be expected from the failure by Texas and its supporters to marshal more than a handful of case citations from the last decade in support of their concerns about the likely burden of a rule that permits respondent's claim to proceed.[8] The

[8] *See* Pet. Br. at 28-30 (citing *Embrey v. Hershberger*, 131 F.3d 739 (8th Cir. 1997) (en banc); *United States v. Richards*, 5 F.3d 1368 (10th Cir. 1993); *Reid v. Oklahoma*, 101 F.3d 628 (10th Cir. 1996), *cert. denied*, 520 U.S. 1217 (1997); *Sones v. Hargett*, 61 F.3d 410 (5th Cir. 1995); and *Pilchack v. Camper*, 935 F.2d 145 (8th Cir. 1991)). Moreover, the cases Texas cites in its parade of horribles would not, in any event, pass muster under the rule we advocate. The petitioner in *Embrey* raised a purely legal claim and did not assert actual innocence of any fact that increased his statutory maximum sentence. *Richards* likewise involved a purely legal question regarding what can be counted in determining weight of amphetamines for purposes of calculating the applicable sentencing guidelines in a federal narcotics case; and as noted above (note 7), the rule we advocate need not implicate guideline sentences within the statutory maximum. And in *Reid*, *Sones*, and *Pilchak*, the petitioners' belated claims were explicitly addressed to the procedures used to secure the earlier convictions on which their later

(Continued on following page)

Second, Fourth, Fifth, and Seventh Circuits all currently have, or have had, a rule allowing a showing of actual innocence of a non-capital sentence to excuse a habeas petitioner from showing cause and prejudice.[9] Although some of those rules are broader than the one advocated here, none has opened the floodgates to new cases. For example, in the decade since the Fourth Circuit expressly allowed such claims, *United States v. Maybeck*, 23 F.3d 888 (4th Cir. 1994), district courts have published only four opinions adjudicating "actual innocence" of a non-capital sentence. Two of these cases involved misapplication of the federal sentencing guidelines,[10] and are thus not directly implicated by the rule we urge. The other two involved federal defendants who received prison sentences for which they were statutorily ineligible, and these petitioners received relief as a result of their habeas petitions.[11] District courts in circuits other than the Fourth Circuit produced even fewer published cases confronting these actual innocence claims. Clearly, there will be no deluge of cases from this Court's acknowledging that *Sawyer v. Whitley* applies in non-capital cases.

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sentences were enhanced; they were not based on actual innocence of those earlier crimes and therefore could not properly be viewed as claims of actual innocence of the subsequent enhancement.

[9] See *Spence v. Superintendent, Great Meadow Corr. Facility*, 219 F.3d 162 (2nd Cir. 2000); *United States v. Maybeck*, 23 F.3d 888 (4th Cir. 1994); *Smith v. Collins*, 977 F.2d 951 (5th Cir. 1992), *cert. denied*, 510 U.S. 829 (1993); *Mills v. Jordan*, 979 F.2d 1273 (7th Cir. 1992); *but see Hope v. United States*, 108 F.3d 119 (7th Cir. 1997) (no longer allowing such claims).

[10] *See Alston v. United States*, 235 F. Supp. 2d 477 (D. S.C. 2002); *Berger v. United States*, 867 F. Supp. 424 (S.D. W.Va. 1994).

[11] *United States v. Payne*, 990 F. Supp. 412 (D. Md. 1998); *Mobley v. United States*, 974 F. Supp. 553 (E.D. Va. 1997).

Similarly, the rule we propose would not, as the State of Texas fears, be so expansive as to undermine "the integrity of the cause and prejudice test." Pet. Br. at 33. For example, if the Court were to hold, as it has in the context of actual innocence claims relating to capital sentencing, that a habeas petitioner "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible" for the enhanced sentence, *Sawyer*, 505 U.S. at 336, the standard for showing the likelihood of a different outcome, but for the challenged error, would be higher than it is under the usual cause-and-prejudice rule. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 695 (1984) (describing the prejudice standard as "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt").[12]

Further, unlike a rule allowing exceptions to default in other contexts of habeas review, applying the actual innocence rule here would not entail the burden of retrying a guilty defendant or even reconvening the factual penalty phase proceeding that established his eligibility for the enhanced sentence. If the defendant prevailed in establishing actual innocence, such a proceeding would be unnecessary; the defendant would simply be resentenced

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[12] Even the more lenient "probably" standard this Court has applied to actual innocence claims attacking the underlying criminal charge, *see Murray v. Carrier*, 477 U.S. 478, 496 (1986) (requiring a showing that "a constitutional violation has probably resulted in the conviction of one who is actually innocent") requires a more compelling showing than *Strickland*'s cause-and-prejudice standard. Accordingly, the Court need not decide in this case whether the proper standard applicable to an actual innocence claim such as respondent's is the "clear and convincing" test under *Sawyer* or a more lenient preponderance test. *See Schlup v. Delo*, 513 U.S. 298, 332-33 (1995) (O'Connor, J. concurring).

to a term within the non-enhanced statutory range. If the defendant failed to establish actual innocence of the fact that resulted in eligibility for the longer sentence, no further proceedings at all would be required. In either case, the burden on prosecutors and courts would be minimal.

2. Allowing An Exception To Procedural Default Rules In This Case Enhances Public Confidence In The Criminal Justice System And The Role Of Prosecutors.

It is of course a truism that the prosecutor

> is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done . . . . But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). Less often cited from *Berger* is the sentence that immediately follows that passage: "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed." *Id.*

Prosecutors have a vital interest in maintaining that confidence. Public confidence in their commitment to fairness rather than victory greatly helps prosecutors to succeed in their mission. And as prosecutors in jurisdictions that have weathered scandals involving police and prosecutorial misconduct know all too well, the loss of that

confidence can make it unduly difficult to win convictions in even the strongest of cases.[13]

The brief submitted by the State of Texas parses respondent's conceded innocence in a manner that would squander that confidence and bolster instead a crippling skepticism among the prospective jurors whom prosecutors encounter every day. For example, Texas asserts flatly that respondent "is not 'actually innocent'" and belittles the claim before this Court by conceding only that "his second felony was committed three days too early." Pet. Br. at 22. The State goes on in a similar vein to describe as a mere "legal technicality that the dates are three days off." But the dates are not merely "off," and respondent's innocence is no more a "technicality" than that of any person who is immune from a term of imprisonment by virtue of the fact that he has not engaged in the proscribed conduct that is punishable with such a term. The citizens of Texas have made a considered decision that those who meet the specific standards of its habitual felony offender statute – and only those who meet such standards – may be punished far more severely than those who commit a theft under the circumstances of this case.

Respondent's opponents have a quarrel that is more properly addressed to the state legislature that did not

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[13] A scandal need not involve wrongdoing by prosecutors themselves in order to adversely affect their ability to secure convictions. *See, e.g.*, Alan Bernstein, *Lawyers adapt to jurors' doubts on lab evidence*, Houston Chronicle, Nov. 16, 2003, at 37 (reporting problems encountered by prosecutors following controversy regarding police department laboratory's handling of evidence; local "jurors more than ever are skeptical of law enforcement testimony in general, and prosecutors are offering more lenient plea bargains to accused criminals if DNA or certain other laboratory evidence is a pivotal part of their case").

prescribe – or even permit – the sentence they would prefer for someone who has acted as respondent has. By treating respondent's actual innocence as an inconvenient technicality to be evaded so as to keep him incarcerated longer than the law allows, Texas risks sending the wrong signal to the jurors, witnesses, victims, attorneys and judges with whom its prosecutors must interact on a daily basis. The State's position sends the message that prosecutors are willing to ignore legal niceties in order to achieve their own vision of rough justice – a vision that the law of the State demonstrably does not endorse. Such a message both reflects and breeds a cynicism that prosecutors can ill afford in the performance of their already difficult duties. In contrast, by allowing claims such as respondent's to proceed, thereby showing their commitment to the rule of law, prosecutors can reinforce the critically important "confidence that [their] obligations . . . will be faithfully observed." *Berger*, 295 U.S. at 88.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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APPENDIX

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